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REPORTS

FROM

THE COURT OF CLAIMS,

SUBMITTED TO THE

HOUSE OF REPRESENTATIVES,

DURING

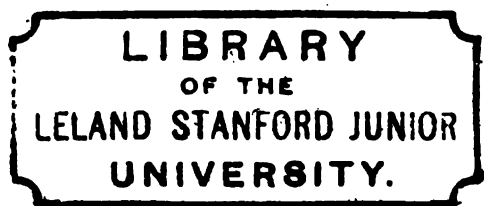
THE FIRST SESSION OF THE THIRTY-FOURTH CONGRESS.

1855-'56.

TWO VOLUMES.

VOL. 1 1 to 26.
VOL. 2 27 to 41.

WASHINGTON:
CORNELIUS WENDELL, PRINTER.
1856.



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THOMAS M. NEWELL.

[To accompany bill C. C. No. 15.]

JULY 25, 1856.

The COURT OF CLAIMS submitted the following

REPORT.

THOMAS M. NEWELL vs. THE UNITED STATES.

To the honorable the Senate and House of Representatives of the United States in Congress assembled :

The Court of Claims respectfully presents the following documents^s as the report in the case of Thomas M. Newell vs. The United States :

1. The petition of the claimant.
2. Documents presented by the claimant as proof, transmitted to the Senate.
3. Opinion of the court.
4. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this tenth day of July,
[L. s.] A. D. 1856.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Judges of the Court of Claims :

The petition of Thomas M. Newell, of Savannah, State of Georgia, respectfully sheweth : That your petitioner, on the 15th day of October, 1834, being at the time a master commandant in the United States navy, was suspended from command by the sentence of a court-martial for the space of five, but which was remitted in part so as to reduce the time of suspension to two years. That in said sentence nothing was contained which deprived your petitioner of any portion of his pay, nor was his pay in any way alluded to. That by the fortieth article of the Rules and Regulations for the government of the navy, contained in the act of Congress of April 23d, 1800, (2 Stat.

51,) it is very clearly implied that the sentence of a court-martial must contain express words of deprivation in order to affect a suspension of pay. And your petitioner is informed and believes that the practice of the department has been in cases of suspension, where the sentence is silent as to pay, to allow the same pay as to officers on leave of absence or waiting orders.

That during the two years of his suspension, he was allowed only half-pay, whilst at least for that period subsequent to the passage of the act of 3d March, 1835, which fixed the pay of masters commandant, when waiting orders, at \$1,800 per annum. That for this period, (from the 3d March, 1835, to the 15th of October, 1836, being one year, seven months, and twelve days,) he is entitled to the unpaid portion of his salary at the rate of \$1,800 a year, amounting to the sum of \$1,455, for which he prays the judgment of this honorable court. That this claim has been presented to Congress, to wit, the 31st Congress, but has not been acted upon by either house, and that your petitioner is sole owner thereof.

And, as in duty bound, he will ever pray.

THOMAS M. NEWELL.

By CHARLES DE SELDING,
Attorney in fact.

A. H. LAWRENCE,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, }
County of Washington, } ss.

Before me, a justice of the peace in and for said county, personally appeared Charles De Selding, attorney in fact, on the sixth day of July, A. D. 1855, and made oath that the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

JOHN L. SMITH.

THOMAS M. NEWELL vs. THE UNITED STATES.

Opinion of the court, by Gilchrist, C. J. :

Upon consideration of the acts of Congress relating to the subject, and the letters of the Fourth Auditor, dated on the 8th of January, 1852, and on the 7th of June, 1856, it is the opinion of the court, that the United States owe the claimant the sum of fourteen hundred and fifty-five dollars ; and we report a bill accordingly.

THOMAS RHODES AND JEREMIAH AUSTILL.

[To accompany bill C. C. No. 14.]

JULY 22, 1856.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of Thomas Rhodes and Jeremiah Austill *vs.* The United States:

1. The petition of the claimant.
 2. Brief of claimant's counsel.
 3. Brief of the solicitor of the United States.
 4. Opinion of the court on preliminary question, in which testimony is ordered to be taken.
 5. Claimant's depositions of witnesses in the case.
 6. Documents referred by the House of Representatives, returned to the House in a separate envelope.
 7. Opinion of the court on the facts.
 8. Bill for the relief of claimants.
- By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the
[L. s.] seal of said court at Washington, this tenth day of July,
A. D. 1856.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Court of Claims:

The petition of Thomas Rhodes, of the State of Mississippi, and Jeremiah Austill, of the State of Alabama, respectfully represents, that a resolution of Congress was passed May 24, 1828, (4 Statutes at Large, 322,) "authorizing the Postmaster General to cause to be examined the route from Mobile to Pascagoula, and if, in his opinion,

it should be the most expedient route to the city of New Orleans, he shall be, and hereby is, vested with full power and authority to adopt that route in lieu of the present one from the city of Mobile to New Orleans." In pursuance of this authority, the Postmaster General, on the first of August, 1828, wrote to the postmasters at New Orleans and Mobile, requesting them to examine said route, and report to him their opinion whether its establishment as a mail route would advance the public convenience. They were required to ascertain the distance; to examine the quality of the ground; to estimate the probable expense of opening a good road for stages; and to ascertain the time that would be saved in conveying the mail between the two cities, and the expense of the transportation of the same three times a week. An examination of the route was made by the postmasters aforesaid, and a report was forwarded to the department, before the 6th day of October, 1828; and on that day the Postmaster General acknowledged the receipt of the report, and informed the postmaster at New Orleans that it was entirely satisfactory, and subsequently informed the postmaster at Mobile that the joint report met his entire approbation.

It being understood, either from an advertisement of the department, or from information obtained from the postmaster at Mobile or New Orleans, that the Postmaster General wished to contract for carrying the mail from Mobile to New Orleans by Pascagoula bay, the petitioners, Rhodes for himself, and said Austill, on the 10th of August, 1828, made a proposal in writing for conveying the mail between the two cities, by way of Pascagoula, three times a week each way. He offered to transport the mail for fourteen thousand dollars a year, but added, that the road from Mobile to Pascagoula must be made by or at the expense of the United States; and then proceeded to say that he would make the road suitable for stages for four thousand dollars, and keep it in repair for four years, the term of the proposed contract. In case he should be required to make the road, *the money to be paid on the completion of the work.*

That it was an essential part of Mr. Rhodes' proposal, and an express condition of his offer to carry the mail for \$14,000, that the government should either make the road, or pay him four thousand dollars for making it; the money to be paid, as aforesaid, on the completion of the work.

On the 7th of October, a letter from the department informed the petitioner, Rhodes, that his proposal for carrying the mail from Mobile to New Orleans, by land and water, at the rate of fourteen thousand dollars per annum, was accepted by the Postmaster General, and requested him to begin with all practicable expedition to convey the mail upon a plan to be designated by the postmasters of Mobile and New Orleans. Although the terms of the acceptance were general, and made no express reference to the opening of the road, yet, as he was required to put the mail in immediate operation, which could not be done until the road was opened, and as this was well known to the department when it gave this direction, they necessarily construed the acceptance of the department, coupled with this direction, as an order to construct the road and put the mail in operation

as soon as possible. The postmasters to whom they were referred for the plan of proceedings concurred in this construction, and with their full concurrence they proceeded to open the road. That the road was completed by the 15th of December, 1828; and on that day they commenced carrying the mail over the same.

The first expense of constructing the road, erecting the bridges, &c., a distance of about forty miles, was about \$3,500. Subsequently, during the winter, it was found necessary to cut ditches on each side of the road, and make other repairs, at an expense of about \$866 more, which was expended for that purpose by the petitioners.

On the 11th of December, 1828, Mr. Austill, in behalf of himself and the petitioner, Rhodes, informed the Postmaster General, by letter of that date, that "Having nearly completed the road, I will commence running the mail on the 15th instant, and I shall expect to be remunerated without delay for cutting the road. I have addressed Mr. Owen upon the subject, which I hope will be attended to." That no answer to this letter was received until he was advised by the letter of the department, dated February 16, 1829, addressed to Jeremiah Austill, in which the department said: "It was supposed you were informed, on the 29th of December last, (as it was the intention of the department at the time,) that the department possessed no means to remunerate you for any expense that you may have incurred in the improvement of the road." In another letter from the department, bearing the same date, he was informed that it was the business of his representative, Mr. Owen, to procure an appropriation from Congress for that purpose.

That this correspondence between the parties, at the time, shows that the road was made by the petitioners in good faith, and under a belief that, according to the terms of the proposals, and the acceptance of the department, it was to be paid for when completed.

Your petitioners further show, that, though they were advised by the letter of acceptance, dated October 7th, 1828, that a contract would be sent to them for execution, yet no such contract was sent from the department until the 12th of March, 1829, and that they were consequently left to act, until the receipt of the letter of the 16th of February, 1829, above referred to, upon their own construction of the legal effect of the proposals and the acceptance of the department.

Your petitioners further state, that when the contract, thus forwarded by the department, was presented to them for execution, they ascertained that it was merely the usual contract for the transportation of the mail between Mobile and New Orleans, for the sum of \$14,000 per annum, and provided no compensation for the construction of the road, and took no notice of that part of the petitioners' proposals which related to the construction of the road, and which, they insist, was as much covered by the acceptance as the price named for the transportation of the mail. The Postmaster General refused to have the contract altered so as to conform to the proposals, and actually refused the mail pay proper, unless the contract should be executed in the form in which it had been prepared by the department. The petitioners having exhausted their means in building the road, and in furnishing and stocking the line, and being greatly embarrassed for

the want of the money expended in constructing the road, were reluctantly compelled to acquiesce in this unjust demand, and to execute the contract in the form required.

At the suggestion of the department, an immediate application was made by the petitioners to Congress for an appropriation to pay for the expense of constructing the road ; but this having failed, and the department having given notice on the 14th of April, 1829, that the route was to be relet, and thus virtually annulled the contract before it had been actually signed, and destroyed the remaining credit of the petitioners, they were obliged to abandon their contract, and only continued to transport the mail until their successor was prepared to carry the same.

The petitioners therefore say, that the first breach of contract was on the part of the Post Office Department, in its failure and refusal to pay for the construction of the road ; and that the failures which were made the pretext for annulling the contract, by the department, were in a great measure caused by its own wrong. This is substantially conceded by the department in a letter of the 11th July, 1829, addressed to the petitioner, Rhodes, in which Mr. Bradley, the Assistant Postmaster General, said : " I have received your letter of the 21st, and regret that the non-appropriation by Congress for opening the road [from] Mobile to Pascagoula bay, had compelled you to give up the contract." That any other causes of failure were such as resulted from the newness of the route, the season of the year, and the character of the country through which the mail had to be carried, being a low and wet one, over which it was impossible to carry the mail with entire regularity until the road became settled, and until a boat better adapted to the navigation than any which could be procured could be constructed.

The petitioners further say, that when the contract was annulled on the 14th of April, 1829, they had nearly completed building a boat at Pittsburg, expressly adapted to the navigation of the waters between Pascagoula and New Orleans ; and that in consequence of the annulment of the contract, they were compelled to dispose of said boat at a large sacrifice ; and that the loss on the same was about \$3,084 20. That they also suffered losses upon the sale of the teams, stages, stables, and other property required for the transportation of the mail upon this route. That other heavy expenses, losses, and damages resulted from the same cause, amounting, as your petitioners believe, to the sum of \$2,704 88, besides the expense of constructing the road.

The petitioners further say, that the road was necessary and of great utility, and continued to be used for the transportation of the mail after their contract was annulled ; and that the government thus had the benefit of this expenditure, in obtaining its subsequent contract for the transportation of the mail at a lower rate of compensation.

Your petitioner, Rhodes, for himself and in behalf of Jeremiah Austill, has made repeated applications to Congress for relief ; and the action of the two houses upon his applications is shown by the statement hereunto annexed.

The petitioners further say, that they have never assigned their

interest in the aforesaid claim, nor any portion of the same, and that they still remain the owners of the same.

The petitioners therefore pray, in consideration of the premises, that the amount of money expended in the construction of the road, with the interest thereon, may be decreed to them, together with such damages for the breach of contract, on the part of the Post Office Department, as in the judgment of this honorable court may seem to be just; and, as in duty bound, will ever pray, &c.

RHODES & AUSTILL.

By JEREMIAH AUSTILL.

STATE OF ALABAMA, }
County of Mobile. }

Personally appeared before me this 18th day of September, 1855, Jeremiah Austill, well known to me to be the person named in the petition, who having been first duly sworn, deposeth, and saith, that the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

Given under my hand as judge of the probate court, in and for said [L. S.] county and State, as witness my hand and the seal of said court, this September 18, 1855.

JOHN A. HITCHCOCK, *Judge.*

CHA. E. SHERMAN,
Attorney for Claimants.

UNITED STATES SENATE.

ACTION ON THE CASE OF THOMAS RHODES.

Session.	Congress.	Reference to Committee.	Action by Committee.	No. of bill reported	How disposed of.
1	21	Post Office and Post Roads.	Reported bill.	184	No action.
1	22	do. do.	do.	204	No action.
2	22	do. do.	do.	24	No action.
1	23	do. do.	do.	12	Passed.
2	23	do. do.	do.	50	No action.
1	24	do. do.	Reported adversely.		Indefinitely postponed.
2	24	do. do.	Reported bill.	200	Passed.
2	25	do. do.	Leave to withdraw case.		
3	25	do. do.	Reported bill.	88	Laid on table.
1	26	do. do.	do.	29	Passed.
2	26	do. do.	do.	31	No action.
1	28	do. do.	Committee discharged; no report.		
2	28	do. do.	Reported bill.	128	No action.
1	29	do. do.	Reported.	100	Passed.
2	29	do. do.	Reported bill.	58	Passed.
1	30	do. do.	do.	28	Passed.

IN HOUSE OF REPRESENTATIVES.

1	23	Post Office and Post Roads.	Reported Senate bill without amendment.		And rejected.
2	23	do. do.	No action by committee.		
2	24	do. do.	Reported Senate bill.	200	No action at all.
2	25	do. do.	S. bill 20 amended and.		Referred to Committee of Whole House.
1	26	do. do.	S. bill 29, adverse report.	325	
1	29	do. do.	S. bill 100 amended.		Referred to Whole House.
2	29	do. do.	S. bill 58 amended.		Referred to Whole House.
1	30	do. do.	S. bill 28, adverse report.	131	Laid on table.
2	30	do. do.	S. bill 28 amended.		Laid on table.
2	31	do. do.	Reported bill.	104	Referred to Committee of Whole House; no action.

THOMAS RHODES AND JEREMIAH AUSTILL }
vs. } *Contract.*
 THE UNITED STATES.

The original contract between the above named parties is in words and figures as follows, and is, or should be, on file in the office of the Postmaster General, to which, for greater certainty, reference is made:

MOBILE, August 16, 1828.

SIR: Having examined the route from this to New Orleans, by the way of Pascagoula bay, and find it much the shortest and most certain way to carry the mail—it must be conveyed thirty or forty miles by land, in stages; the residue of the way by steamboats—I have made a calculation of the cost, and, having charge of a first-rate steamboat of 139 tons, called Marietta, and am owner, with Jeremiah Austill and Robert Williamson, all of the city and county of Mobile, have agreed to lay in proposals for conveying the mail, agreeably to your proposals, thrice a week, for the sum of \$14,000 per year, and have authorized Jeremiah Austill to write to that effect. If Austill's proposals should not come to hand you may consider this a proposal. The road from this to Pascagoula to be made by, or at the expense of, the United States. The road I will be obligated to make within sixty days from the time I may receive the notice, for the sum of four thousand dollars, or for one hundred dollars per mile, and will keep it in good repair for the term of four years from the time of the completion of the work. The money to be paid on the completion of the work.

If it should be necessary to convey the mail by this route before the stage-road is complete, we will have it carried on horseback. This route the mail can be carried at least four hours sooner than by steamboats from port to port, taking the best weather, and scarcely a probability of being detained by bad weather any time.

I case of our getting the contract I should like to have the earliest information, or in case I should have the opening of the road.

I am, sir, with due respect, yours,

THOS. RHODES.

N. B.—Please to inquire of George W. Owen respecting capacity, &c., or of any gentlemen you may think proper in Mobile, as I am known here.

T. R.

POST OFFICE DEPARTMENT,
Office of Mail Contracts, October 7, 1828.

SIR: The Postmaster General has decided to accept your proposal to transport the mail, by land and water, between Mobile and New Orleans, at the rate of fourteen thousand dollars per annum. You will begin with all practicable expedition, and convey the mail upon a plan designated by the postmasters of Mobile and New Orleans. A contract will be made out and sent for you to execute.

Respectfully, &c.,

P. BRADLEY.

Mr. THOMAS RHODES, *Mobile, Ala.*

PHILLIPS *for the claimant.*

The petition states the resolution of Congress 24th May, 1828, vesting the Postmaster General "with full power and authority to adopt" the new route.

That under this, the Postmaster General wrote to the postmasters at Mobile and New Orleans to report the probable expense of "*opening a good road for stages.*" This report was made, and on the 6th October, 1828, the Postmaster General replied that the joint report met his entire approbation.

The petitioner offered to carry the mail on this route for \$14,000, "the road from this to Pascagoula to be made by or at the expense of the United States." He then adds, that he will undertake to make the road for \$4,000, payment to be made on the completion of the work. That if it should be necessary to convey the mail on this route before the road is completed, he will have it carried on horseback.

The day after the Postmaster General wrote to Mobile and New Orleans postmasters, Mr. Bradley, the assistant, wrote to petitioner, to wit, 7th October, 1828, accepting the proposal for carrying the mail for \$14,000. "You will begin with all practicable expedition and convey the mail upon a *plan designated by the postmasters at Mobile and New Orleans.* A contract will be made out and sent for you to execute."

With the concurrence of the postmasters at Mobile and New Orleans, they went to work and finished the work by the 15th December, 1828.

The petitioners allege that no contract was sent to them to be executed until the 12th March, 1829.

The contract purports to have been executed on the 1st of October, 1828; but that this is not the true date of execution is evident from the facts:

1st. That on 7th October, the department writes, "a contract will be made out and sent to you."

2d. That the contract shows by its endorsement that the oath required by law was not taken until 2d April, 1829.

On 11th December, 1828, Austill writes to the department that, "having nearly completed the road, I will commence running on the 15th inst., and shall expect to be remunerated without delay for cutting the road."

No answer was received to this letter until 16th February, 1829, when the department writes, "*it was supposed* you were informed on 29th December last, as it was *the intention of the department at that time*, that the department had no MEANS to remunerate you," &c.; and, in another letter of same date, he was referred to Mr. Owen to obtain an appropriation.

When the contract arrived, the demur of the parties to it, as containing no stipulation as to the road, was met with the refusal to pay the mail pay proper without it was executed as it stood; and, under the force of these circumstances, they were compelled to sign.

The road has been of great service to the government, and they continued to use it long after their contract had been annulled, and it enabled the government to transport the mails at a lower rate than they could otherwise have done. My propositions are:

1st. That as there was no road fitted for the transportation of the mail between the designated points, the authority given to the Postmaster General, to "adopt that route," carried with it the power to *make the road*.

2d. That if the department was not authorized, yet the facts of this case show that the agents of the government had, either wilfully or unintentionally, deceived the parties into the construction of the road. That the road was necessary for the use of the government, and was valuable to them in enabling them to have the mails carried at a less cost; and having thus been benefited by the labor and means of the petitioner, the government is bound to refund.

The advertisement for contract, 17th of June, 1828, was to carry the mail by water as usual. (See advertisement.)

Apply these facts to a case among citizens. If the agent did exceed his authority, but the principal used the road and had the full benefit of the improvement, could he in equity have resisted the payment of it?

There have been fifteen reports in the Senate favorable to this claim. In twelve different Congresses it passed the Senate nine times. During this period there was one unfavorable report, and this was *indefinitely postponed*.

During the same period, in the House there have been *but two* adverse reports.

As to the equity of the claim, see letter of Judge McLean, 23d March, 1848, and letter of Mr. Bradley, 2d February, 1830.

On the final hearing in the petition of Rhodes, et al.

BRIEF OF UNITED STATES SOLICITOR.

This is a claim for pay for constructing a road from Mobile to Pascagoula, under a contract with the Post Office Department, made in 1828.

The solicitor denies that the Post Office Department contracted for the construction of the road.

The letters set out in the petitions of August 16 and October 7, are relied on to prove such a contract. These letters are not the contract between the parties. That was subsequently executed, and dates back to the 1st October. It is not contended that this was executed under duress, or is not obligatory for any reason.

This formal contract does not cover the claim. This purports to be the whole contract between the parties. It is inadmissible to vary or add to it by other proof.

But the letters relied on do not prove any contract to pay for the road. The acceptance is explicitly confined to the proposition to carry the mail for \$14,000.

It is argued, however, that the proposition was a whole, and that the acceptance must be taken to be an acceptance of it all, although in terms it is limited to the proposition to carry the mail.

It is not necessary to show that the claimants knew that it was at best an acceptance of the proposition to carry the mail. The evidence shows that these parties did know, and did act on the knowledge, that the acceptance was limited to the mail contract.

1. This is shown, *first* by the letter of Austill, of October 8, in which it appears they knew previously that the department had no power to contract for making roads. When the department agreed, therefore, to pay \$14,000 for carrying the mail, they knew that nothing more was to be implied, because they had been informed that no contract would be made by the department on the other point.

2. The letter of December 11, relating that Austill had been to New Orleans to get contributions from the citizens to make this road, shows that the reliance was not on the contract with the department.

3. What he says of his application to Congress, through Mr. Owen, shows that he intended to appeal to Congress, as he had appealed to the citizens of New Orleans; and shows that they did not regard themselves as having any legal claim against the government in virtue of the contract with the Post Office Department.

4. The fact that the contract, executed after all these letters, contains no stipulation in relation to the road, is not conclusive as the legal evidence, but conclusive that the parties have regarded the claim now presented as growing out of the contract with the Post Office Department.

THOMAS RHODES vs. THE UNITED STATES.

The opinion of the court was delivered by Chief Justice Chilchrist.

This claim is now twenty-six years old. It has been before Congress at sixteen sessions. There have been nine favorable reports upon it in the Senate, and it has passed the Senate nine times. It has been once rejected by the House, and at seven sessions there has been no action upon it.

The resolution of Congress of the 24th May, 1828, (4 Stat. at Large, 322,) authorized the Postmaster General to cause to be examined the route from Mobile to Pascagoula, and if, in his opinion, it should be the most expedient route to the city of New Orleans, he was authorized to adopt it in lieu of the then present one from Mobile to New Orleans.

On the 17th of June, 1828, the Postmaster General gave notice that proposals would be received at the department for carrying the mail three times a week between Mobile and New Orleans in steamboats. At this time there was no road from Mobile to Pascagoula, and the mail was necessarily transported for the whole distance by water. On the 1st of August, 1828, the Postmaster General requested the postmasters at New Orleans and Mobile to examine the route from Mobile to Pascagoula, and to report to him, among other things, upon the quality of the ground, and to estimate the probable expense of opening a good road for stages.

On the 16th of August, 1828, the claimant wrote to the department, saying that the route from Mobile to New Orleans, by the way of Pascagoula bay, was much the shortest and most certain way to carry the mail; and saying also, "it must be conveyed thirty or forty miles by land in stages; the residue of the way by steamboats." He then offered to carry the mail agreeably to the proposals three times a week for the sum of \$14,000 per year, and added: "The road from this to Pascagoula to be made by or at the expense of the United States. The road I will be obligated to make within sixty days from the time I may receive the notice for the sum of four thousand dollars, or for one hundred dollars per mile;" "the money to be paid on the completion of the work." His letter closes by saying: "In case of our getting the contract, I should like to have the earliest information, or in case I should have the opening of the road."

On the 7th of October, 1828, Mr. Bradley, of the office of mail contracts, wrote to the claimant that the Postmaster General had decided to accept his proposal to transport the mail by land and water between Mobile and New Orleans, at the rate of \$14,000 per annum.

The letter of the claimant is free from any reasonable doubt. The substance of it is, that the mail from Mobile to New Orleans, by way of Pascagoula bay, must be conveyed partly by land in stages, and the residue of the way by steamboats; that he would convey the mail for \$14,000 per year; that the road to Pascagoula must be made at the expense of the United States; that he would make it within sixty days for the sum of \$4,000, the money to be paid on the completion of the work.

This was clearly a proposal to transport the mail by land and water.

The land route was from Mobile to Pascagoula, where the road was to be made; the water route was from Pascagoula to New Orleans. It was so considered by the department; for the acceptance is of a proposal to transport the mail "by land and water." But the proposal is, in substance, to transport the mail by land and water for \$14,000 per year, provided the United States would pay the expense of making the road over the land route, as there was no road in existence. It was not a proposal to carry the mail for \$14,000 by land and water unconditionally, but if the United States would pay the expense of making the road. An acceptance of the proposal, upon any reasonable construction, is an acceptance of the proposal with the conditions, unless they are excluded by the terms of the acceptance; or the transaction may be regarded as an offer by the claimant to transport the mail for \$18,000 per year for the first year, and to build the road; for, in substance, it amounts to that. It was well known by the department that there was no road from Mobile to Pascagoula, and that without such a road the mail between Mobile and New Orleans could not be transported by land and water. According to the claimant's offer, the road was completed by the 15th of December, and on the 17th of December he wrote the department that he should commence running the mail by that time. Now, as his offer was to make the road in sixty days, he should have been informed by the department that the offer was not accepted at once. Instead of that, he received no answer to his letter until he received the letter of the department of the 29th of February, 1829, when he was informed that the department possessed no means to remunerate him, and that the department intended so to inform him on the 29th of December. This, by the way, would have been after the expiration of the time within which he offered to make the road.

The resolution of May 24, 1828, authorized the Postmaster General to adopt the route from Mobile to Pascagoula, if, in his opinion, it should be the most expedient route from Mobile to New Orleans. He caused the route to be examined, and was of opinion that it was the most expedient one. He thus had power to adopt the route, and a question arises as to the extent of that power. At that time there was no road over which the mail could be transported. Now, to adopt a route for the transportation of the mail, means to take the steps necessary to cause the mail to be transported over that route. If it does not mean as much as that, the resolution of Congress is nugatory. The Postmaster General had the power to contract with the claimant to transport the mail over that route, and to agree to pay him for such duty \$18,000 for the first year, and \$14,000 for the remaining years of the existence of the contract. This is the substance of the two letters of the claimant and Mr. Bradley construed together. It was worth more to transport the mail for the first year over a country where there was no road than it would be during the years succeeding, and there was no reason why the claimant should not receive a compensation commensurate with the value and difficulty of his services. If the Postmaster General may lawfully pay a larger sum for the transportation of the mail over a difficult and expensive route than for transporting it over an easy and cheap route, *a fortiori*, he may

pay a larger sum for such transportation, where, in addition to conveying the mail, the contractor is compelled to make a road over which to transport it. If he contracts to transport the mail from one given point to another, between which points it is known that no road exists, and that to fulfil his contract he must cut down hills and fill up valleys, and make a road through a wilderness with the trees he finds in his path, and bridge streams, he may, surely, without any violent expansion of the powers of the department, be compensated for such duty and expense by a sum sufficient to pay him for carrying the mail under such circumstances. He says, in effect, to the department: "I cannot afford to transport the mail for \$14,000 per year, because, in addition to the expense of coaches, horses, and drivers, I must incur the expense of putting the road in a passable condition. If you will pay me enough for the first year to enable me to do this, I will carry the mail." We see nothing unreasonable either in such a proposition or in its acceptance; and if this cannot be done, the resolution of Congress is idle, and gives the Postmaster General no available authority whatever.

The question of damages will properly be considered hereafter; and we think it is a proper case in which to order testimony to be taken.

THOMAS RHODES & JEREMIAH AUSTILL

vs.

THE UNITED STATES.

} Notice under Rule XL.

Please to take notice that I propose to take depositions in the above entitled cause before R. B. Owen, or James A. Kennedy, commissioners of the city of Mobile, Alabama, appointed by the judges of the Court of Claims, and to examine as witnesses, Walter Drane, of Loundes; Ursin Rabby, of Pascagoula; Lemuel Childers, of Bayou Batré; and E. Austill, of Mobile, and any other person, on the 12th day of May next, at 12 o'clock noon, at the office of the said Owen; and that said witnesses will be examined on the interrogatories hereunto annexed.

WASHINGTON, March 21, 1856.

CHARLES E. SHERMAN.

Per J. E.,

Attorney for Petitioners.

M. BLAIR, Esq.,

U. S. Solicitor Court of Claims.

I waive time and accept notice.

M. BLAIR, *Solicitor U. S.*

Interrogatories to be administered to Walter Drane, of Loundes; Ursin Rabby, of Pascagoula; Lemuel Childers, of Bayou Batré; E. Austill, of Mobile, and any other persons, witnesses to be produced, sworn, and examined before R. B. Owen, or James A. Kennedy, of Mobile, Alabama, commissioners appointed by the judges of the Court of

Claims, in a certain cause now pending in the Court of Claims, on the petition of Thomas Rhodes and Jeremiah Austill :

1st Int. What is your name, occupation, age, and place of residence for the past year? have you any interest, direct or indirect, in the claim which is the subject of inquiry? are you, and in what degree, related to the claimants or either of them?

2d Int. Do you know the petitioners above named, Thomas Rhodes and Jeremiah Austill, or either, and which of them?

3d Int. Do you, or do you not, know whether they were contractors for carrying the United States mails between Mobile and New Orleans in the years 1828 and 1829?

4th Int. Was there, or was there not, any road suitable for stages from Mobile to Pascagoula, when they became contractors? and if not, please state whether they were obliged to construct such a road, and did construct such a road, whereon to transport the mail; and when the said road was completed, and the mail transported thereupon?

5th Int. Do you, or do you not, know what was the expense incurred by said Rhodes & Austill in the construction of said road, including bridges and ditches, and all other necessary expenses? State the same fully. If you do not know the actual expense incurred by the contractors for the purposes aforesaid, please state, according to the best of your knowledge and belief, what would be a reasonable compensation therefor.

9th Int. Was or was not said road, or a large portion of the same, used by subsequent contractors in transporting the mails between Mobile and New Orleans, and until the mail was transported between Mobile and New Orleans wholly by water?

Lastly. Do you know of any other matter relative to the claim in question? If you do, state the same fully and at large, as if particularly interrogated thereunto.

CHARLES E. SHERMAN.

Per J. E.,

Attorney for Petitioners.

OFFICE OF THE CHIEF CLERK COURT OF CLAIMS,
Washington, April 18, 1856.

I hereby certify, that the foregoing are true copies of the original interrogatories filed in the office of the chief clerk of the Court of Claims, to be propounded to the witnesses therein named, and others, in the case of Thomas Rhodes and Jeremiah Austill *vs.* The United States; and also of the waiver and admission of the solicitor of the United States in reference to the same.

In testimony, whereof, I have hereunto set my hand and affixed [L. s.] the seal of said court at Washington, on the day and year last above mentioned.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

THOMAS RHODES AND JEREMIAH AUSTILL }

vs.

THE UNITED STATES.

In the Court of Claims.

Depositions of Ursin Rabby, Lemuel Childers, and Walter Drane, on the part of the claimants in the above entitled cause, the said witnesses having been produced, sworn, and examined before me, a commissioner of said court, at my office in the city of Mobile, at the times hereinafter mentioned.

That is to say : Ursin Rabby being first sworn and examined this 12th May, 1856, deposes and says as follows to the interrogatories to him propounded, to wit :

1st Int. What is your name, occupation, age, and place of residence, for the past year? Have you any interest, direct or indirect, in the claim which is the subject of inquiry? Are you, and in what degree, related to the claimants, or either of them?

Answer. My name is Ursin Rabby; my age is about 57 years; occupation is that of a farmer, and my residence for the past year has been at East Pascagoula. I have no interest whatever in the claim. Am not in any way related to the claimants or either of them.

2d Int. Do you know the petitioners above named, Thomas Rhodes and Jeremiah Austill, or either, and which of them?

Answer. I know them both.

3d Int. Do you, or do you not, know whether they were contractors for carrying the United States mail between Mobile and New Orleans, in the years 1828 and 1829?

Answer. I know that they were contractors for carrying the mail in those years.

4th Int. Was there, or was there not, any road suitable for stages from Mobile to Pascagoula when they became contractors? and if not, please state whether they were obliged to construct such a road, and did construct such a road, whereon to transport the mail; and when the said road was completed and the mail transported thereupon?

Answer. There was no road at all between Mobile and New Orleans at that time. They were obliged to make a road, and did make one, whereon to convey said mail. The said road was completed and the mail transported thereupon, as near as I can remember, about twenty-eight years ago.

5th Int. Do you, or do you not, know what was the expense incurred by said Rhodes & Austill in the construction of said road, including bridges and ditches, and all other necessary expenses? State the same fully. If you do not know the actual expense incurred by the contractors for the purposes aforesaid, please state, according to the best of your knowledge and belief, what would be a reasonable compensation therefor.

Answer. I was employed by the petitioners to work on said road whilst it was being constructed; and though I do not know the actual expense incurred by them for its construction, I am satisfied, from my knowledge of the country over which it ran, and of the work done upon it, that it could not have been done for less than \$7,500.

6th Int. Was or was not said road, or a large portion of the same, used by subsequent contractors in transporting the mails between

Mobile and New Orleans, and until the mail was transported between Mobile and New Orleans wholly by water?

Answer. Said road was used by subsequent contractors in transporting the mails between Mobile and New Orleans, until the route was changed to that by water.

Lastly. Do you know of any other matter relative to the claim in question? If you do, state the same fully and at large, as if particularly interrogated thereunto.

Answer. I have stated about all I know in relation to the matter.

URSIN RABBY.

Lemuel Childers being next sworn and examined in answer to the said interrogatories above written and answered by said Rabby, whose deposition is above written, deposes and says—that is to say:

To the first interrogatory he says: My name is Lemuel Childers; my occupation that of a farmer; I am between sixty-three and sixty-four years of age, and have resided for the year past in Mobile county, Alabama; have no interest at all in the claim, nor am I in any way related to the claimants.

To the second interrogatory he says: I know both the petitioners.

To the third interrogatory he says: They were contractors for carrying the mail between the points inquired of, in the years inquired of.

To the fourth interrogatory he says: There was no road at all when they became contractors, that it would be possible for a coach to travel on. They built a road, and when completed they transported the mail thereon.

To the fifth interrogatory he says: I superintended the work upon the said road as overseer. They were engaged in building said road from November, 1828, to some time in July of 1829; and, though I do not know what the actual cost was to them, I think it must have been all of \$7,000. I worked on the road four months as overseer, and during that time there were an average of twenty hands engaged in work upon it. After I ceased to be overseer, I hired on the work and had business on it, and know that they continued the work on it, and carried the mail. The bridges on said road were not built by the hands working on the road, but were built by contract, with the exception of one, the Jackson bridge, which was built by the hands.

To the sixth interrogatory he says: The greater part of said road was used by subsequent contractors in transporting the mail, and continued to be so used until the route was changed to that by water.

To the last interrogatory he says: I have stated all I know of the matter.

[And here the examination was adjourned to Tuesday, 13th May, 1856.]

LEMUEL CHILDERS.

Walter Drane being next sworn and examined in answer to said interrogatories which are above written, and which have been answered by

Ursin Rabby and Lemuel Childers, whose depositions are above written, deposes and says, this 13th day of May, 1856, as follows, to wit:

To the first interrogatory he says: My name is Walter Drane; occupation that of a farmer, and my residence is in Loundes county, Alabama, and I am in the sixtieth year of my age; have no interest, either direct or indirect, in this claim; I am the brother-in-law to one of the claimants, Jeremiah Austill, but am in no way related to the other claimant, Thomas Rhodes.

To the second interrogatory he says: I have been for many years well acquainted with both of them; have known them for about thirty-four years.

To the third interrogatory he says: They were contractors for carrying the United States mail between Mobile and New Orleans in the years 1828 and 1829.

To the fourth interrogatory he says: There was no road at all between Mobile and Pascagoula suitable for transporting the mail on at that time. The claimants were obliged to construct such a road, and did do so; and when the said road was completed, which was in the fall of 1828, the mail was transported on it in the fall and winter of that year, until about May of 1829.

To the fifth interrogatory he says: The first construction of the road cost the claimants \$4,000. This was exclusive of ditches and causeways. After the road was opened, and the winter had set in, a full third of the road had to be ditched and causewayed to enable the stages to pass over it; and owing to the unfavorable country over which it ran, lighter vehicles had to be procured by the contractors than they had begun to use at first; and all this cost them about \$4,000 more, making the whole cost incurred by them \$8,000. I was well acquainted with the said road; was over it frequently, and am satisfied that \$8,000 would be nothing more than a just compensation to the claimants for the labor and money put upon it.

To the sixth interrogatory he says: I removed from Pascagoula, where I was then residing, in May or June of 1829, and in consequence do not know whether said road was used by subsequent contractors or not.

To the last interrogatory he says: I have no further information in relation to this claim than I have already given in answer to the preceding interrogatories.

WALTER DRANE.

THE STATE OF ALABAMA, }
Mobile County. } ss.

On the 12th day of May, 1856, and on the 13th day of May, 1856, personally came Ursin Rabby, Lemuel Childers, and Walter Drane, the witnesses above named—that is to say, Ursin Rabby and Lemuel Childers on the 12th, and Walter Drane on the 13th of said month, and after having been sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the above deposition were written down by the commissioner, and then proposed to each of the said witnesses, and their answers thereto were written down by

the commissioner in the presence of the witnesses, who then subscribed the deposition in the presence of the commissioner.

The depositions of Ursin Rabby, Lemuel Childers, and Walter Drane, taken at the request of Thomas Rhodes and Jeremiah Austill, were used in the investigation of a claim against the United States now pending in the Court of Claims in the name of said Rhodes and Austill.

The adverse party was notified, did not attend, and did not object.

RICHARD B. OWEN,
Commissioner.

Commissioner's fees, \$15; postage, 20 cents; paid by claimants.

IN SENATE OF THE UNITED STATES.—*January 30, 1852.*

The Committee on the Post Office and Post Roads, to whom was referred the memorial of Thomas Rhodes, asking compensation for improving the mail road between Mobile and New Orleans, report:

That this case has been before the committee on a former occasion, and that they see no reason for altering the opinion which they have already expressed in a report annexed to the documents on file. They therefore ask leave to refer to that report for the facts of the case, and the reasons which induce them to return it back to the Senate, with a recommendation that the accompanying bill be passed.

IN SENATE OF THE UNITED STATES.—*March 30, 1854.*

The Committee on the Post Office and Post Roads, to whom was referred the petition of Thomas Rhodes, report:

That the claim of the petitioner was presented at the last session of Congress, and a bill for his relief reported. The committee concurring in the views expressed in the previous report, hereto annex the same and report the accompanying bill.

IN SENATE OF THE UNITED STATES.—*March 29, 1854.*

The Committee on the Post Office and Post Roads, to whom was referred the petition of Thomas Rhodes, submit the following report:

That the committee have examined the claim of the petitioner, and present a statement of the facts on which his claim is founded. During the session of Congress in 1828, a resolution was passed, "authorizing the Postmaster General to cause to be examined the route from Mobile to Pascagoula, and if, in his opinion, it should be the most expedient

Rep. C. C. 28—2

route to the city of New Orleans, he shall be, and hereby is, vested with full power and authority to adopt that route in lieu of the present one from the city of Mobile to New Orleans." In pursuance of this authority, the Postmaster General, on the 1st of August, 1828, wrote to the postmasters at New Orleans and Mobile, requesting them to examine said route, and report to him their opinion whether its establishment as a mail route would advance the public conveniences. They were required to ascertain the distance; to examine the quality of the ground; to estimate the probable expense of opening a good road for stages; to ascertain the time that would be saved in conveying the mail between the two cities, and the expense of three weekly trips. An examination of the route was made by the postmasters aforesaid, and a report made and forwarded to the department, before the 6th day of October, 1828, and on that day the Postmaster General acknowledged the receipt of the report, and informed the postmaster at New Orleans that it was entirely satisfactory, and subsequently informed the postmaster at Mobile that the joint report met his entire approbation. It being understood, either from an advertisement of the department, or from information obtained from the postmaster at Mobile or New Orleans, that the Postmaster General wished to contract for conveying the mail from Mobile to New Orleans, by Pascagoula bay, the petitioner, for himself and Jeremiah Austill, on the 10th of August, 1828, made a proposal in writing for conveying the mail between the two cities, by way of Pascagoula, three times a week each way. He offered to transport the mail for fourteen thousand dollars a year, but added that the road from Mobile to Pascagoula must be made by, or at the expense of, the United States; and then proceeds to say, that he would make the road suitable for stages for four thousand dollars, and keep it in repair for four years, the term of the proposed contract.

On the 7th of October, a letter from the department informed the petitioner that his proposal for carrying the mail from Mobile to New Orleans, by land and water, at the rate of fourteen thousand dollars *pe annum*, was accepted by the Postmaster General, and requested him to begin with all practicable expedition to convey the mail upon a plan to be designated by the postmasters of Mobile and New Orleans. This acceptance of the proposal of the petitioner said nothing about that part of the proposal relating to opening the road. The petitioner and Austill commenced making the road, and had it completed so as to begin carrying the mail upon it on the 15th of December, 1828, and continued to carry the mail until the last of May, 1829. Failing to carry the mail according to their contract, the Postmaster General, on the 14th of April, 1829, advertised for proposals to let the route again, of which the petitioner was advised, but he continued to convey the mail until the last of May following, being one year and five and a half months that their service continued under this contract, during which the mail failed many times. The department paid them \$4,928 98, being \$324 89 more than they were entitled to receive, at the rate of compensation stipulated in their contract. Jeremiah Austill failed and left the country, and the responsibilities of the concern were thrown on the petitioner, who made a claim upon

the department for the expenditure he had incurred in opening the road to Pascagoula bay, which the Postmaster General declined to pay, alleging that he had no authority to apply the revenues of the Post Office Department to an object of that kind; and informed the petitioner that he must look to Congress for relief. It appears that the road, or some part of it, was used for transporting the mail for some time, and that it has been of considerable public advantage.

The question presented by these facts is, whether, under the circumstances of the case, the petitioner has an equitable claim on the government to be remunerated for the expense he incurred in opening the road. He claims that his proposal for carrying the mail four years for fourteen thousand dollars per annum was connected with a condition, which, from the nature of the case, could not be separated from it—namely, that the United States was to open the road, or agree to pay him four thousand dollars for doing it. The Postmaster General adopted or established the mail route by Pascagoula, and accepted the proposal of the petitioner for carrying the mail upon it, without saying anything in regard to that part of the proposal of the petitioner which related to opening the road, although he must have known that the mail could not be conveyed on that route without the road being opened. Did not the acceptance by the Postmaster General of that part of the proposal of the petitioner which related to carrying the mail, which he knew could not be performed without the road being first opened, authorize the petitioner to believe that if he constructed the road, he would in some way be paid for it? It appears to the committee that it did, and that there was an implied or tacit engagement that the petitioner was in some way to be remunerated for his expenses in opening the road. It does not appear, from any of the correspondence, that the department ever claimed or expected that the contractors were to construct the road at their own expense. Was it just, or strictly honest, in the government to accept one part of a proposition for a contract, consisting of two parts, when they knew that the part accepted could not be performed without the other part was also agreed to; and when they had reason to believe that the part accepted would not have been offered but in connexion with the part which was not accepted? The committee are of opinion that the petitioner has an equitable claim to be reimbursed the money he has expended in opening the road, being \$3,500; but as he appears to have been overpaid for carrying the mail to the amount of \$324 89, they deduct that sum from the amount of the claim, leaving \$3,175 11, and report a bill for paying him that sum from the treasury.

AN ACT for the relief of Thomas Rhodes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any moneys in the treasury not otherwise appropriated, the sum of three thousand one hundred and seventy-five dollars and eleven

cents to Thomas Rhodes, in full satisfaction for the expenses incurred by him in opening and constructing a road from Mobile, in Alabama, to Pascagoula bay, for the transportation of the mail, in the year eighteen hundred and twenty-eight, in pursuance of an implied authority and contract from the Postmaster General.

To the Editors of the Mobile Commercial Register :

GENTLEMEN : I have observed a communication in the United States Telegraph, of the 15th ult., from the Post Office Department, to the president of the Senate, relative to certain contracts ; and among them, one that recently existed between that department and Rhodes and myself, to which in self-justification I must beg leave to reply. Mr. T. Barry, the present incumbent, states in his communication that his predecessor made a contract with Rhodes & Austill to transport the mail three times a week between Mobile and New Orleans for 14,000 dollars a year ; that they commenced the service on the 15th day of December, 1828 ; but the heavy expense incident to the undertaking soon involved them in pecuniary ruin, and under circumstances calling for *commiseration* rather than censure ; and that they were compelled to abandon the contract, and in the beginning of June, 1829, their contract was annulled.

The following is a true statement of the case : In the year 1828, Thomas Rhodes and myself proposed to convey the mail by stages and by steamboats from this place to New Orleans by the way of Pascagoula, three times a week, for the sum of 14,000 dollars per annum ; *upon condition* that the government would make a road from this to Pascagoula, or that we would make it for four thousand dollars or one hundred dollars a mile, which proposition and condition were accepted by Mr. McLean, and he required us to get in readiness with all possible despatch. Accordingly we employed hands to open the road, and on the 15th of December, 1828, it was opened barely sufficient for the stages to pass, for at that time, as it is well known by many, the ground was so soft that the stages could not run, and we procured small light carriages to use until the road would settle and become hard by use. After a trial of two months, we found it would be necessary to have another steamboat, and on the 14th of February, 1829, I left for Pittsburg by Washington city, with the promise from a gentleman of this city that I could have what funds I should want if any, to obtain one or two boats : provided, that the Postmaster General would reimburse me for the road. I then called on my way upon Mr. McLean, and informed him through Mr. Bradley how we were progressing, and that I was on my way to buy or build suitable boats, and that I wished him to pay me for the road, and also for the time the mail had been transported. He replied that he was unauthorized to make any appropriation for the road, and that he would not pay me for the transportation of the mail unless I would sign the contract, leaving out the road altogether. I had no alternative but to sign the contract and to petition Congress for the appropriation, which I did,

and received the money for the transportation of the mail up to that time, and proceeded on to Pittsburg, which place I reached on the 17th of March, and on the 18th contracted for the building of a boat, which would have been in Mobile on the 15th of July following by contract. But under date of the 16th day of April, to my astonishment, I saw proposals for letting out the contract, signed by the present incumbent. I then wrote on to my partner to stop the mail, for the postmaster had annulled the contract, who on the 1st of June received my letter and stopped the conveyance. In January, 1830, Captain Rhodes and myself called on Mr. Barry for a balance due for the transportation of the mail, and at the same time we laid before him a copy of the proposals and the acceptance, with a request that he would pay for the road; and if he would not, to state in writing *his reason* for annulling the contract and for the non-payment of the amount stipulated for the road. He then requested that the papers might be left with him until the next morning so as to give him time to examine them, and on the second or third day afterwards we called again, and he replied that he could not pay the balance due for the transportation of the mail, until we would produce a certain certificate from the postmaster at Mobile.* I then asked him if he would not make any reply upon the subject of the road and contract. He then had to acknowledge that he had not examined any of the papers. I then gave him the substance of them; to which he replied that he did not feel disposed to make or give a voluntary explanation, but if the members of Congress required it of him he would do so: he is entitled to some credit for putting that clause in. We then left Mr. Barry, and as yet we have received nothing for the road and damages but Mr. Barry's *commiseration*; and if this is administering justice, God forbid that I should ever have any more of it.

And if this simple statement of facts should not be credited, I will prove them when required.

JEREMIAH AUSTILL.

POST OFFICE DEPARTMENT,

August 1, 1828.

At the last session of Congress, a resolution was passed authorizing the Postmaster General to cause to be "examined the route from Mobile to Pascagoula; and if, in his opinion, it should be the most expedient route to the city of New Orleans, he shall be and hereby is vested with full power and authority to adopt that route, in lieu of the present one from the city of Mobile to New Orleans." To enable me to discharge the duties imposed by this resolution, I have to request that some convenient time before the first of November next, in conjunction with the postmaster of Mobile, you examine said route, and report to me your opinion whether its establishment would advance the public convenience.

* Alleging that we had no legal but an equitable claim after the 16th of April, at which time he had annulled the contract.

In making your examination, it would be well to ascertain the quality of the ground on which the road is now opened, or may be located; also, the expense that may be necessary to make it a good road for stages. An estimate of the distance of this land route will be proper, and also of the time that could be saved, should it be established as the mail route between the two cities over the present route. It would be well also to make an estimate of the expense of carrying the mail three trips weekly on the proposed route, and whether one steamboat would not be sufficient to perform three trips weekly between Pascagoula and New Orleans.

I wish also to know whether the mail-boat plying between these points would be as likely to be interrupted by storms as on the present water route. It would be also interesting to know whether the new route would be as satisfactory to the citizens of New Orleans as the present route; and I wish you to report any other fact connected with the subject which it may be important for me to know, in making up an opinion on the eligibility of the route. I have written a similar letter to this to the postmaster at Mobile, and I wish you to confer with him, and prepare to make the examination, with as little delay as may comport with your convenience.

Respectfully, &c.,

J. McLEAN.

A. DUPUY, P. M.,
New Orleans, Louisiana.

POST OFFICE DEPARTMENT,
August 18, 1828.

I regret exceedingly the delays in the transmission of the eastern mail between Mobile and New Orleans. It was hoped that the authority given to you and the postmaster at Mobile would have been so used as to procure some tolerable degree of regularity; at least that the transportation of the mail should not depend on chance. Perhaps during the sickly season, when all business almost is suspended, two trips weekly between Mobile and New Orleans would be satisfactory.

These, I think, might be secured, without an extravagant rate of compensation. I wish you would take immediate steps to give all possible regularity to the mail. By giving notice, I should suppose that a schooner might be procured to run the two trips, without paying a high sum. It is to be regretted, that when the smallest amount is realized in receipts by the department, there is generally the least efficiency in the transportation of the mail, and the department is compelled to pay about double for the service over what is paid in more productive parts of the country.

Twenty thousand dollars cannot be given by the department, or a sum approximating to that amount, for the conveyance of the mail between Mobile and New Orleans. This sum would nearly equal the whole receipts of postage at New Orleans, and is greater than the department can expend on that object. It is hoped that a favorable

arrangement will be made, under the notice now in course of publication for this contract.

The late contractor was released from his contract on the strength of the assurance in one of your letters, that you had made an arrangement with the proprietors of the steamboats to convey the mail three trips weekly between the above cities, and I regret that the boats were found unsuitable for the service.

If no arrangement can be made at any reasonable sum, the mail had better be sent on the former route.

I despair of making any arrangement for a reasonable sum, with a person in your section of the country, but I hope in the North there will be found an efficient contractor, who will undertake to perform the service at nearly the same terms of the late contract.

J. McLEAN.

A. DUPUY, P. M.,
New Orleans, Louisiana.

POST OFFICE DEPARTMENT,
September 27, 1828.

It is believed that the route for the New Orleans mail cannot be relied on by the way of St. Stephens and Madisonville. There are numerous streams of water and other obstructions on this route, which would cause continual failures. The ground may admit of a good road, but who is to make it? I regret there is so little attention paid to roads in all the slaveholding States.

The mail is desired with the same certainty and expedition as it is conveyed in the States where the roads are paved. But this is impracticable. Until the road you suggest shall be made good, the principal mail to New Orleans cannot be conveyed on it. I have strong expectations that the route by the way of Pascagoula will be found to be the best one. If so, it shall be established immediately, although I am informed that there is no road from Mobile to the bay. Should not a road be opened by the voluntary contributions of the citizens of Mobile, the mail must be conveyed on horseback. To convey the mail to New Orleans in fourteen days from Washington, if it be at all practicable, would require an expenditure greater than all the receipts for postage in the State of Louisiana. It is expected that the time may be reduced to sixteen days, should the Pascagoula route be established.

J. McLEAN.

A. DUPUY, P. M.,
New Orleans, Louisiana.

POST OFFICE DEPARTMENT,
October 6, 1828.

Your joint report with the postmaster of Mobile, on a mail route between Pascagoula and Mobile, is satisfactory, and I have established

the route. A bid is accepted to convey the mail three times weekly on this route from New Orleans, and it will be put into operation as soon as circumstances will admit.

I have not the control of any fund which can be applied to the construction of the road, but I hope that the States of Alabama and Mississippi will cause it to be opened. The advantage to the citizens of New Orleans and Mobile will be so great, from the establishment of this route, that I hope the road may be opened and made passable for stages, by voluntary contribution. When this route shall go into operation, I hope to reduce the time of the mail to sixteen days between this city and New Orleans.

I will thank you to make out your account, in conjunction with Mr. Stone, for your expenses and time, in making the late examination.

J. McLEAN.

A. DUPUY, P. M.,
New Orleans, Louisiana.

POST OFFICE DEPARTMENT,
Office of Mail Contracts, October 7, 1828.

SIRS: The report you have communicated to the department relative to the land route between Mobile and Pascagoula, has met with the *full approbation* of the Postmaster General. It evinces accuracy and a sound, discriminating judgment. That route will be pursued as soon as practicable, and we will thank you to state the best mail arrangement the department can adopt in regard to your offices, and the depending or connecting mails.

P. BRADLEY.

Messrs. A. DUPUY, *Postmaster, New Orleans*, and WILLIAM D. STONE,
Postmaster, Mobile, Alabama.

POST OFFICE DEPARTMENT,
Office of Mail Contracts, October 7, 1828.

SIR: The Postmaster General has decided to accept your proposal to transport the mail by land and water between Mobile and New Orleans at the rate of fourteen thousand dollars per annum. You will begin with all practicable expedition, and convey the mail upon a plan designated by the postmasters of Mobile and New Orleans.

A contract will be made out and sent for you to execute.

P. BRADLEY.

Mr. THOMAS RHODES,
Mobile, Alabama.

POST OFFICE DEPARTMENT,
December 29, 1828.

The Postmaster General requests that you inform this department as early as feasible what plan governs the mail transportation between your office and New Orleans. Does Mr. Rhodes carry the mail? When did he begin? Did you receive my letter of October on the above subject?

P. BRADLEY.

POSTMASTER, *Mobile, Alabama.*

POST OFFICE DEPARTMENT,
January 12, 1829.

The postmaster at New Orleans reports, under date of the 23d December ult., that the mail *via* Mobile which was due on Sunday at 7 p. m. did not arrive until Monday at 1½ a. m., and that a correspondent failure would by your detention for the New Orleans mail occur at Mobile. The Postmaster General apprehends that your boats are deficient and not adapted to the expeditious transportation or safety of the mail. The department had calculated greatly on your ability and punctuality, and therefore allowed you a liberal compensation. Unless you come up to your engagements, payment need not be expected. Yours is an important link in the great chain of mail transportation, and if you cannot keep it sound, it must be committed to other hands. The interest of the community must be looked to, and no excuse on the part of contractors can make amends for failure to comply with their engagements. The Postmaster General requests your prompt attention to the subject-matter of this communication.

P. BRADLEY.

Capt. THOMAS RHODES,
Mobile, Alabama.

POST OFFICE DEPARTMENT,
January 23, 1829.

The Postmaster General regrets the inadequacy of the steamboats for mail transportation to New Orleans. He wishes you to state the plan presented for Mr. Rhodes's government.

P. BRADLEY.

POSTMASTER, *Mobile, Alabama.*

POST OFFICE DEPARTMENT,
February 9, 1829.

The mail due at New Orleans on Friday, the 16th ult., did not arrive till the next day; and the mail due on Saturday evening, the

18th, was not expected till the following Tuesday, causing a total failure. Your pay must be suspended to cover penalties. The department places reliance on your energy and means, and feels great regret to be disappointed.

P. BRADLEY.

Mr. THOMAS RHODES,
Mobile, Alabama.

POST OFFICE DEPARTMENT,
February 9, 1829.

Mr. Rhodes has been informed that his pay will be suspended to cover penalties incurred by failures to deliver your mail, as per your letter of the 18th ultimo.

P. BRADLEY.

A. DUPUY, P. M.,
New Orleans, La.

POST OFFICE DEPARTMENT,
February 13, 1829.

You will inform Mr. Rhodes that the Postmaster General has no alternative but to fine him.

P. BRADLEY.

POSTMASTER, *Mobile, Alabama.*

POST OFFICE DEPARTMENT,
February 18, 1829.

No such condition as that alleged by Mr. Austin has been attached to the contract, nor cannot be, as the Postmaster General has no authority by law to make such conditions as a part of the contract. The contractors have no claims on the department but for transportation services; they will be paid accordingly.

P. BRADLEY.

POSTMASTER,
New Orleans, La.

POST OFFICE DEPARTMENT,
February 19, 1829.

Your mails with New Orleans must not be interrupted. If the boats fail, the contractors must employ vessels till the boats are repaired.

P. BRADLEY.

WM. D. STONE, P. M.,
Mobile, Alabama.

POST OFFICE DEPARTMENT,
February 23, 1829.

The course adopted as indicated in your letter of the 7th inst. was the correct one, and anticipated the instructions of the department having direct reference to that subject, as will appear by a letter now on its way to you.

P. BRADLEY.

WM. D. STONE, P. M.,
Mobile, Alabama.

POST OFFICE DEPARTMENT,
February 24, 1829.

Mr. Dupuy did right in the instance mentioned in your letter of the 3d instant, as he has ever done in furthering the views of the department and guarding against failures, and in that case anticipated the views of the department, and we look confidently to his continuing to do so.

P. BRADLEY.

B. CASEAUR, Esq.,
Assistant P. M., New Orleans, La.

POST OFFICE DEPARTMENT,
February, 28, 1829.

The Postmaster General directs that when the steamboat fails you will send the mail by packet at the contractor's expense. Please to inform the contractors of this decision.

P. BRADLEY.

POSTMASTER,
New Orleans, La.

POST OFFICE DEPARTMENT,
March 3, 1829.

The postmaster of New Orleans always does his duty so far as our knowledge extends. By his vigilance we are aware many failures have been saved.

P. BRADLEY.

ASSISTANT POSTMASTER,
New Orleans, La.

POST OFFICE DEPARTMENT,
March 20, 1829.

A bond and contract for the conveyance of the mail between your office and New Orleans were sent to your office to be executed by Mr.

Rhodes, on the 12th instant. I will thank you to alter the same so as to read: "This contract made the first of October, in the year one thousand eight hundred and twenty-eight," instead of twenty-seven, and return the same without delay to this office.

P. BRADLEY.

POSTMASTER,
Mobile, Alabama.

POST OFFICE DEPARTMENT,
March 21, 1829.

If the contractors will use due diligence and put in requisition all their means, still the public will not be satisfied. Suitable boats must be used. Your reports are very acceptable and appropriate.

P. BRADLEY.

POSTMASTER,
Mobile, Alabama.

POST OFFICE DEPARTMENT,
March 23, 1829.

Your letter of the 7th instant is received. The loss of bridges between Macon, Georgia, and Montgomery, Alabama, has caused several failures of the mail. Suitable boats alone will enable Mr. Rhodes to fulfil the contract.

P. BRADLEY.

POSTMASTER,
Mobile, Alabama.

POST OFFICE DEPARTMENT,
April 9, 1829.

A paragraph in a late newspaper states a fact of a most singular character, viz: That eastern intelligence published in the Mobile journals reached New Orleans several days before the regular mails; and also that the mails are detained for days at Pascagoula bay. The department can hardly credit such representation, as your vigilance would have prompted a direct report of such occurrences. The Postmaster General wishes you at once to state whether or not there be foundation for such representation; and that you force the mails through with all possible despatch. You will also report the condition of Mr. Rhodes without delay, and his prospects of fulfilling the contract.

P. BRADLEY.

POSTMASTER,
Mobile, Alabama.

POST OFFICE DEPARTMENT,
April 14, 1829.

As you have not carried your engagement into effect which you made with the department, to transport the mail between the cities of New Orleans and Mobile, the Postmaster General has considered it his duty to invite other proposals for the performance of the service which you have failed to accomplish, agreeably to your engagement to do, and the route is now again advertised.

P. BRADLEY.

Mr. THOMAS RHODES,
Mobile, Alabama.

POST OFFICE DEPARTMENT,
April 20, 1829.

Your letter of the 4th inst., covering a bond and contract executed by Mr. Rhodes, has been received. You have not lately kept the department advised whether the mail is regular or otherwise, or whether steamboat navigation has been resumed. My late letter having reference to a new contract for said route will reach you this month. Every failure should, as heretofore, be reported.

P. BRADLEY.

WM. D. STONE, P. M.,
Mobile, Alabama.

POST OFFICE DEPARTMENT,
April 30, 1829.

The Postmaster General requires that you promptly report each and every failure of the mails connected with your office, and that you keep up the Mobile route regularly.

P. BRADLEY.

POSTMASTER,
New Orleans, La.

POST OFFICE DEPARTMENT,
May 13, 1829.

Your official duties have been so fully and satisfactorily performed, that when I wrote you I could not believe any imputation rested on you.

Your letter of the 27th ult. fully shows the way in which the intelligence had reached New Orleans earlier than through the regular channel of communication.

P. BRADLEY.

WM. D. STONE, P. M.,
Mobile, Alabama.

POST OFFICE DEPARTMENT,
May 23, 1829.

Mr. Thomas Rhodes, the contractor, in a communication to the postmaster of Mobile, dated "Pascagoula, May 2, 1829," writes as follows: "The post office people in New Orleans have again detained the mail and refused to deliver it to my agent. This puts it out of my power to give you the mail; besides, if we should be a little after hours, say 6 o'clock p. m., we cannot get the mail before 6 or 7 a. m. the next day. There must be some change, or I cannot get on with my contract." We trust, sir, this representation may be made on mistaken grounds. It is the imperative duty of postmasters to aid in the expediting of the mail's transportation, and not to retard it. No personal hostility or misunderstanding must be suffered for one moment to interfere with the public interest. We look for a prompt and satisfactory reply.

P. BRADLEY.

POSTMASTER,
New Orleans, La.

POST OFFICE DEPARTMENT,
May 27, 1829.

Your course was an erroneous one beyond a doubt, as stated in your letter of the 3d inst., from the fact that Captain Rhodes could not, without extreme inconvenience, receive the mail in person; at times it would be impossible for him to do so; he is responsible, besides, for his agents. The rule adopted, if persevered in, would arrest the mail's movements throughout the country, as a contractor can be at one point only at one time. Some contractors have a dozen routes and fifty places, perhaps, for the receipt and delivery of mails.

P. BRADLEY.

POSTMASTER,
New Orleans, La.

POST OFFICE DEPARTMENT,
May 29, 1829.

Your letter of the 5th inst. is received. It is evident that neither the conduct of your clerks nor of Captain Leech can be approved; the course you took with respect to your clerks was the correct and prudent one. The mail should be delivered to the contractor or any agent selected by him, duly sworn according to the requisition of the post office law.

P. BRADLEY.

POSTMASTER,
New Orleans, La.

POST OFFICE DEPARTMENT,
June 2, 1829.

Your partner, Mr. Austill, has drawn for the last quarter's pay to pay for the boat now building for you at Pittsburg; there were no funds to meet the draft which you lately made on this office. The letter of the Hon. Mr. Owen shows that you are performing the contract as punctually as can be done until a better boat is obtained.

P. BRADLEY.

RHODES & AUSTILL, *Mobile, Ala.*

POST OFFICE DEPARTMENT,
June 8, 1829.

Yours of the 23d ultimo gives a lamentable account of difficulties in the mail's transportation to and from New Orleans. A remedy must be applied.

P. BRADLEY.

POSTMASTER, *Mobile, Ala.*

POST OFFICE DEPARTMENT,
June 15, 1829.

The Postmaster General deeply regrets the great irregularity of your mails from Mobile; he hopes that suitable steamboats may soon be provided, and that a decided improvement will be made in your intercourse. No means of the department shall be left untried to produce this most desirable end.

P. BRADLEY.

POSTMASTER, *New Orleans, La.*

POST OFFICE DEPARTMENT,
June 18, 1829.

The department will look to your vigilance and promptitude in forwarding the mail to Mobile both expeditiously and reasonably, till a contract can be made. Mr. Rhodes' arrangements here have been such as to occasion confusion throughout. We trust that the mail's transit on this great and important route may be speedily established regularly and expeditiously.

P. BRADLEY.

POSTMASTER, *New Orleans, La.*

POST OFFICE DEPARTMENT,
June 20, 1829.

It is true Mr. Rhodes has not been duly paid, but it is alike true he has never conveyed the mail for a full week as he contracted to do. If he had been punctual he would have been promptly paid.

P. BRADLEY.

POSTMASTER, *New Orleans, La.*

POST OFFICE DEPARTMENT,
June 29, 1829.

The temporary mail arrangement made by you, as indicated in your letter of the 13th instant, is a good one; let it be continued until a permanent engagement is made.

P. BRADLEY.

POSTMASTER, *Mobile, Ala.*

POST OFFICE DEPARTMENT,
July 11, 1829.

I have received your letter of the 21st, and regret that the non-appropriation by Congress for opening the road from Mobile to Pascagoula bay has compelled you to give up the contract. We are not advised what Mr. Austill did in respect to the steamboat; the last letter from him stated that it was in progress. He received for pay on the contract up to December 31, 1828..... \$608 89
Draft paid on the 1st April..... 3,000 00
Your draft paid July 1st..... 1,300 00
Of Mr Dupuy..... 20 00

So that you stand debtor for..... 4,928 89

We have not given you any credit, on the ground that the contract was not complied with; but you are entitled to pay for the times when you did carry it. I will, therefore, thank you to forward me a statement of the particular times when you carried it, since the 1st December last, mentioning whether it was carried in a steamboat or by other vessels, that we may give you proper credits. It appears to me that the mail might be carried in a small steamboat, drawing not more than two feet water, all the way from Mobile, and at all times, excepting during violent winds. Two boats, with accommodations for twelve passengers, would be sufficient for the service. The number of passengers would not justify elegant and expensive boats.

P. BRADLEY.

THOMAS RHODES, *Mobile, Ala.*

POST OFFICE DEPARTMENT,
July 17, 1829.

If, as your letter of the 29th ultimo states to be the case, your detention referred to arose from the impassable state of a bridge or bridges, you should be excused for the failure; but the fact is, that the mail, while confided to you, was not carried agreeable to contract, it is believed, in a single instance. It may have been carried from the one city to the other within the time stipulated; but if it was, the fact is not recollected by the department. Our impression is, that the schedule was never conformed to; I do not speak positively on this point, but state such to be our impression.

P. BRADLEY.

THOMAS RHODES, Esq.,
Near Mobile, Ala.

POST OFFICE DEPARTMENT,
January 15, 1830.

Your letter of the 13th instant has been considered, and I am instructed to say that the facts of record in this department go conclusively to show, that from the acceptance of the proposition of Mr. Rhodes, in October, 1828, to transport the mail by land and water between the cities of Mobile and New Orleans, to the 14th April, 1829, when new proposals were invited for said route by the new Postmaster General, a succession of failures were reported by the postmasters of Mobile and New Orleans, which coerced the department to annul the contract with Mr. Rhodes; that he was repeatedly warned of the consequence which would follow his failure to comply with his engagements, and as repeatedly failed to profit thereby. Under these circumstances, which appear in the correspondence, it is not perceived that injustice has been done Mr. Rhodes, but, on the contrary, that the measures adopted in his case were imperiously demanded by the public interest.

ARTHUR NELSON,
for the POSTMASTER GENERAL.

JEREMIAH AUSTILL, Esq.,
At Brown's Hotel, Washington, D. C.

POST OFFICE DEPARTMENT,
January 20, 1830.

After due consideration given to your claim for a balance due you by the department, and a thorough investigation of the correspondence on the subject of the mail's transportation under your contract, between Mobile, Ala., and New Orleans, La., it is decided that, to entitle you to further credits than those already made you by the department, it will be incumbent on you to show, by the certificate of

the postmaster at Mobile, the particular times you did carry said mails since the 1st December, 1828, with a specification of the manner you transported it—whether in a steamboat or by other vessels. On an exhibit of this evidence, the Postmaster General will cause your account to be equitably settled.

ARTHUR NELSON,

for the POSTMASTER GENERAL.

THOMAS RHODES, Esq., *Present.*

MOBILE, *August 9, 1828.*

SIR: I have observed in the public papers that proposals would be received to carry the mail from this place to New Orleans by steamboats, three times a week, which I have no doubt can be done, but not without considerable risk of failures, and at a very considerable expense to the contractor. Having made myself acquainted with the geography of the country, I beg leave to propose a different route for your consideration, which I believe would be attended with less risk, and at much less expense; and in the event of its being adopted, I will make you a proposition, viz: To carry the mail in a stage from this place to Pascagoula, thence to New Orleans by a *steamboat*, three times a week, in less than twenty-two (22) hours from city to city, for the sum of fourteen thousand dollars per annum, upon condition that the road from this place to Pascagoula bay is put in a suitable condition for the stage, which may be done at a very small expense, there being no water or streams in the way.

I have the honor to be your obedient servant,

JEREMIAH AUSTILL.

JOHN MCLEAN, Esq.,
Postmaster General.

MOBILE, *October 8, 1828.*

DEAR SIR: I have recently received a letter from Mr. Owen upon the subject of the contemplated mail-route to New Orleans, in which he informs me that you have no authority to contract for cutting the road to Pascagoula; therefore, to obviate the difficulty that may exist thereby, I will make you another proposal, if it should not be too late, in behalf of myself, Thomas Rhodes, William Mathison, and Robert Williamson, all of this State; and that is, we will transport the mail within the time and manner first proposed, at the following rates, to wit: for the first year at eighteen thousand, and each of the succeeding three years at fourteen thousand dollars per annum.

Therefore, should you accept of our proposals, we shall require the earliest notice, so that we may not delay in cutting out the road, so as to admit the mail to pass.

I have the honor to be your obedient servant,

JEREMIAH AUSTILL.

JOHN MCLEAN, Esq.,
Postmaster General.

MOBILE, *December 11, 1828.*

SIR: Upon the faith of your opinion and belief, I proceeded to New Orleans for the purpose of obtaining contributions or some appropriations for opening the mail road and other purposes from this to New Orleans, and I regret to have to inform you that I have not obtained one cent, but, on the contrary, they appeared to be offended at the idea that such a thing should have been expected of them. I was likewise sorry to learn that the Navigation Company would not permit me to enter the pickets for less than six thousand dollars, or thereabouts, per annum, unless I exclude all passengers, from whom I expect a profit; for it will take all of the fourteen thousand dollars to pay expenses. Having nearly completed the road, I will commence running the mail on the 15th instant, and I shall expect to be remunerated, without delay, for cutting the road. I have addressed Mr. Owen upon the subject, which I hope will be attended to.

I have the honor to be your obedient servant,

JEREMIAH AUSTILL.

JOHN McLEAN, Esq.,
Postmaster General, Washington.

POST OFFICE, MOBILE,
December 15, 1828.

SIR: Capt. Rhodes commenced this morning to take the mail between this and New Orleans, under the contract for transporting it via Pascagoula in stages.

I have the honor to be, very respectfully, your obedient servant,
WM. D. STONE.

P. BRADLEY, Esq.,
Assistant Postmaster General, Washington city.

POST OFFICE, MOBILE,
February 11, 1830.

SIR: At the request of Mr. Rhodes, late mail contractor, I have the honor to inform the department that Mr. Rhodes commenced on the 15th December, 1828, to convey the mail between this office and New Orleans in stages and wagons overland between this and Pascagoula, and by steamboat between New Orleans and Pascagoula, and continued to do so until the 30th May, 1829.

It will be understood, however, by the department that the mail was not regularly conveyed by Mr. Rhodes during the time above mentioned according to his contract. Some weeks I received three mails, other weeks two, and one week but one mail, so that every trip may be considered as a failure under his contract except two.

I am, sir, respectfully, your obedient servant,

WM. D. STONE.

S. R. HOBBIE, Esq.,
Assistant Postmaster General, Washington city.

THE STATE OF ALABAMA, }
County of Mobile. } ss.

Personally appeared before me, B: B. Breedin, a notary public, in and for Mobile county, duly commissioned and qualified, and dwelling in the city of Mobile, Walter Drane, to me well known, who made solemn oath that the foregoing are true and faithful copies of certain letters received by Jeremiah Austill, at Mobile, from the General Post Office Department; and further, that the original of each is now in his possession.

WALTER DRANE.

Sworn to and subscribed before me, the 28th day of January, 1830.

B. B. BREEDIN,
Notary Public.

POST OFFICE DEPARTMENT, OFFICE OF MAIL CONTRACTS,
February 16, 1829.

SIR: It was supposed you were informed on the 29th December last, (as it was the intention of the department at the time,) that the department possessed no means to remunerate you for any expense that you may have incurred in the improvement of the road. It was hoped that the company referred to in your letter of the 11th December would be more reasonable in their tolls.

Respectfully, your obedient servant,

P. BRADLEY.

JEREMIAH AUSTILL, Esq.,
Mobile, Alabama.

POST OFFICE DEPARTMENT, OFFICE OF MAIL CONTRACTS,
February 16, 1829.

SIR: On the 29th of December, a letter was directed to be written to you, purporting that the Postmaster General could not pay you for opening the road. That expense he cannot meet in any case without a special law for the purpose; nor has he in a similar case recommended an appropriation for a similar road: that province belongs to your representative in Congress. Until this day I had thought that the letter was sent to you on the 29th December, as it was directed to be done. The quarterly pay will be sent if the services are performed.

I am, sir, your obedient servant,

P. BRADLEY.

JEREMIAH AUSTILL, Esq.,
Mobile, Alabama.

POST OFFICE DEPARTMENT, OFFICE OF MAIL CONTRACTS,
October 29, 1828.

SIR: The proposals had been closed, and a contract made for the route Mobile and New Orleans, before your letter of the 8th instant reached the department.

Respectfully, your obedient servant,

P. BRADLEY.

JEREMIAH AUSTILL, Esq.,
Mobile, Alabama.

CINCINNATI, March 23, 1848.

DEAR SIR: I have but an indistinct recollection of the facts stated by Dr. Bradley, in relation to the road made by Mr. Rhodes. The fact of making the contract I remember, and that the new route on which the mail was to be carried was considered a great improvement on that important line of transportation. But I am not able to recollect the particulars as to the construction of the road. It was about forty miles long and passed over a sterile country, uninhabited, and the greater part of it unfit for cultivation.

Doctor Bradley was the Second Assistant Postmaster General, and whose duty it was to superintend the transportation of the mail. I have no doubt his statement is substantially correct. He had an accurate memory, and his statements of facts are entitled to the highest confidence. I regret that you did not name the circumstances to me before I left Washington, as an examination of the papers might have refreshed my memory as to the facts.

The construction of the road was important to the public, as it shortened the distance of the most important southern route from New Orleans. It is probable that more was saved to the public by the establishment of the road, in the transmission of the mail over it for four years, than would pay the costs of its construction. In addition to this, the increased speed with which the mail was conveyed between New Orleans and Mobile was important to the commercial interests of those cities, and of all other places connected with them.

Mr. Rhodes seems to have a strong equitable claim, and I trust it will be duly considered by Congress.

With great respect and esteem, yours,

JOHN McLEAN.

Hon. JOHN GALE.

POST OFFICE DEPARTMENT, OFFICE OF MAIL CONTRACTS,
March 25, 1830.

SIR: I have the honor to transmit, herewith, in obedience to a call from the Committee on the Post Office and Post Roads of the 24th instant, the following papers in relation to the contract of Thomas

Rhodes and Jeremiah Austill, for the transportation of the mail between Mobile and New Orleans, viz :

No. 1. The advertisement for the conveyance of the mail between New Orleans and Mobile, under which Rhodes and Austill became the contractors in 1828. [Their proposal is now filed in the Treasury Department.]

No. 2. A copy of the letter of acceptance.

No. 3. A copy of the contract.

No. 4. A copy of a letter showing their contract to be forfeited.

No. 5. A copy of a letter to one of the contractors showing that the department could not be responsible for any expense attending the opening of a road between Mobile and Pascagoula.

The department is not in possession of any facts relative to the time of commencing, or the expense attending, the opening and construction of the road between Mobile and Pascagoula.

The road is now partially used for transporting the mail.

With great respect, your obedient servant,

W. T. BARRY.

Hon. GEORGE M. BIBB, *Chairman of the
Committee on Pst Office and Post Roads, Senate.*

WASHINGTON CITY, *February 2, 1830.*

DEAR SIR: Agreeably to your suggestion of this morning, I will endeavor briefly to state the case of Captain Rhodes, so far as my knowledge extends. After Congress had authorized the mail to be transported between Mobile and New Orleans, via Pascagoula bay, the late Postmaster General directed the postmasters of Mobile and New Orleans to survey (or explore) the land route, being a distance of about forty miles. This route, with others, was advertised, and proposals invited, to convey the mail between these cities by land and water. As the road was not made so that carriages could pass, and the mail be carried with regularity, Captain Rhodes proposed to open the road, and also to convey the mail; his proposal to convey the mail was accepted, but the other proposal was not accepted, as Congress had not authorized the measure. Captain Rhodes went on and opened the road, at an expense of nearly \$4,000, and has not, I believe, ever received any remuneration whatever. The service he rendered was of great public importance, as it was essentially necessary to carry out the object Congress had in view, viz: the establishment of a mail route on which reliance could be placed for the mail's regularity, not only between the cities of Mobile and New Orleans, but at the nearest and most expeditious mail route between the Atlantic States and the latter city. The services rendered were so clearly understood by Judge McLean, that he would promptly have reimbursed the sum necessarily expended in the undertaking if he had possessed the authority to do so. The road, ever since it was opened, has been used as a public or national road, and it has essentially contributed to the speedy and certain transmission of the mail between all the Atlantic States and New Orleans.

I know of no claim upon the government which appears to me more equitable than Captain Rhodes's, and I flatter myself that the proper authorities will do this gentleman justice.

I trust Judge McLean, the late Postmaster General, will substantially corroborate the foregoing statement, and concur with me in saying that the labor of Captain Rhodes has proved to be of essential service to the public.

I have the honor to be, dear sir, your obedient servant,

P. BRADLEY.

Hon. Mr. KING, *U. S. Senate.*

CINCINNATI, OHIO, *February 18, 1830.*

DEAR SIR: I accidentally put my letter into my trunk, and did not notice the circumstance till I reached this city yesterday. I regret the occurrence.

P. BRADLEY.

To the Senate and House of Representatives of the United States in Congress assembled:

The petition of Thomas Rhodes, of the city of Mobile, in the State of Alabama, respectfully represents, that in the early part of the year 1828, your petitioner, in connexion with Jeremiah Austill, late of said city and State, became the contractors for the transportation of the mail between the said city of Mobile and New Orleans, by virtue of proposals made and promulgated by the then Postmaster General. Your petitioner further represents, that prior to the above-mentioned period, an attempt had been made by other persons, under the authority of the General Post Office Department, to carry the mail between the said cities entirely by water, but that owing to the various difficulties and delays which that route presented, it was eventually abandoned. The rapid increase of commercial intercourse between these cities, and the repeated solicitations of the community, continued to urge on the attention of the department the great and vital necessity of a speedy, certain, and frequent passage of the mail between those places. Inasmuch, therefore, as the scheme of transporting the said mail wholly by water had then recently failed, and inasmuch as from a variety of reasons it was evident that the old route entirely by *land* could not answer the purpose, it was believed, and the suggestion was made to the late Postmaster General, that the object in view could be easily accomplished, by tracing out a road from the city of Mobile to the mouth of Pascagoula river, in the State of Mississippi, over which the mail could be transported in mail-stages, and thence by water, in steamboats, to the city of New Orleans. Your petitioner further represents, that the postmasters of New Orleans and Mobile, by authority of instructions from the Postmaster General, proceeded to mark out the said road, which having been completed, your petitioner, together with the said Jeremiah Austill, became the joint contractors for the carriage of the mail by the route thus designated.

Your petitioner further represents, that the General Post Office Department having no authority to appropriate the public money to the purposes of cutting out roads and constructing bridges, and that no appropriation had been made by Congress for this particular road, but that being assured and verily believing that such an appropriation would be made, and urged by the great necessity of an immediate commencement of the route, the contractors proceeded, upon their own private funds, to cut out and open the said road, in length from forty to forty-five miles, the greater part of which lay through an almost trackless wilderness, and in the execution of which they were necessarily compelled to build bridges over creeks and rivers, and construct causeways; that they expended in the work upwards of thirty-five hundred dollars, and were laboriously employed for about three months. Your petitioner further represents that, for reasons not necessary now to be set forth, the said contract has been withdrawn from your petitioner and the said Austill, and that the said Austill has long since left the United States, leaving your petitioner involved in heavy responsibilities, to which they had been subjected in the transportation of the said mail. Believing, as your petitioner verily does, that the road cut out by the contractors has proved, and will always remain, a permanent benefit to the public at large—that it will facilitate the mail communication between the said cities—and believing that upon every principle of justice he ought to be remunerated for the same to the extent at least of his expenditures, he respectfully and humbly invokes your honorable bodies to pass an act allowing him compensation therefor out of the treasury of the United States.

And, as in duty bound, he will ever pray.

THOS. RHODES.

We, the undersigned, citizens of Mobile, in the State of Alabama, being conversant with the facts set forth in the foregoing petition of Thomas Rhodes, and believing from a variety of circumstances that his is a case of great hardship, and demanding the interposition of Congress, cannot but earnestly unite in the prayer of the petitioner.

J. G. Lyon
M. Hunter
Henry Lewis
Nathan Whiting
B. B. Breedin
Chas. Jerkoot
James Dowell
Robertson & Barnewall
McLaskey, Hogan & Co.
Wells & Rea
G. Tompkins
John Patterson
Thos. Sturtevant
Isaac Muker
N. F. Ledyard
Geo. W. Lewis
Isaac H. Erwin

Jas. P. Wilson
J. F. Adams
J. B. Toulmin
Tho. Perry
G. W. Owen
Henry Daggett
John Duncan
Thos. Bates
Richd. Corre
Bunce & King
Benj. Wilkins
Wm. Quigley
Byard Sheffield
N. Hayden
Lewis Leland, jr.
U. Ogden
S. Chandler

Dunning & Knapp
 Wm. C. Coolidge
 B. Arnet
 James J. Marsh
 Ross, Crane & Strang
 Geo. H. Statster
 Sidney Douglass
 J. M. Ross
 J. P. Ross
 James Campbell
 Wm. Calvert
 David White
 E. E. Pidney
 Joseph N. Williams
 David Pawnill
 Jno. F. Everitt
 P. Malone
 Wm. De Forest Holly
 Peter Getchiff
 Samuel G. Swift
 Henry Gunnison
 Calvin Norris
 F. W. Armstrong
 Thomas Mather
 R. G. Gordon
 Geo. E. Hall
 H. V. Chamberlain
 Geo. F. Salli
 Geo. Walker
 A. Rust Cuyter
 A. W. Gordon
 Jos. E. Sheffield
 J. W. Moore
 R. G. Barde
 Joshua Kennedy
 H. Chamberlain
 E. Murray
 G. A. Benoit
 James L. Day
 Benj. F. Smoot
 D. P. Squire
 J. Mufsun
 Richd. R. Wilkins
 James J. Brady
 G. Hugg
 John Campbell
 John Ticknor
 Pell. B. Sutton

J. Norking, jr.
 L. Mitchell
 Andw. Armstrong
 D. Simpson
 W. R. Hallets
 C. C. Hazard
 Moses Ryan
 J. Emanuel
 James A. Tashat
 T. Sanford
 P. Putnam Rea
 William Hall
 Jas. Windall
 Arch. Smoot
 Clinton Ford
 John Austin
 Jesse Folder
 T. H. Lane
 Wm. Austin
 Thos. P. Norris
 Thos. Casey
 Bott. D. Crawford
 David Files, jr.
 J. W. Curtis
 Curtis Lewis
 J. B. Nixon
 T. T. Holt
 C. Weelda & Co.
 T. M. English
 M. Krafft
 E. P. Dickinson
 Henry Bright
 S. H. Thompson
 William Brooks
 F. M. Alexander
 C. Jannbot
 John F. Pagles
 Gurdon Robinson
 Benjamin Stantoup
 R. H. Gould
 R. W. Lewis
 Edwd. King
 Edward Hall
 H. Chesebrough
 John S. Aire
 Joseph Krebs
 Jno. Elliott
 George Poe, jr.

MOBILE, *August 16, 1828.*

SIR: Having examined the route from this to New Orleans by the way of Pascagoula bay, and find it much the shortest and most certain way to carry the mail—it must be conveyed thirty or forty miles by land, in stages; the residue of the way by steamboats—I have made a calculation of the cost, and, having charge of a first rate steamboat of 139 tons, called Marietta, and am owner, with Jeremiah Austill and Robert Williamson, all of the county and city of Mobile, have agreed to buy in proposals for carrying the mail, agreeably to your proposals, thrice a week for the sum of \$14,000 per year, and have authorized Jeremiah Austill to write to that effect. If Austill's proposals should not come to hand, you may consider this a proposal. The road from this to Pascagoula to be made by or at the expense of the United States. The road I will be obligated to make within sixty days from the time I may receive the notice, for the sum of four thousand dollars, or for one hundred dollars per mile, and will keep it in good repair for the term of four years from the time of the completion of the work; the money to be paid on the completion of the work.

If it should be necessary to convey the mail by this route before the stage-road is complete, we will have it carried on horseback. This route the mail can be carried at least four hours sooner than by steamboats from post to post, taking the best weather, and scarcely a probability of being detained by bad weather at any time.

In case of our getting the contract I should like to have the earliest information, or in case I should have the opening of the road.

I am, sir, with due respect, yours,

THOMAS RHODES.

To the POSTMASTER GENERAL.

N. B.—Please to inquire of George W. Owen respecting capacity, &c., or of any gentleman you may think proper in Mobile, as I am known here.

T. R.

POST OFFICE DEPARTMENT, OFFICE OF MAIL CONTRACTS,
April 14, 1829.

SIR: As you have not carried your engagements into effect which you made with the department, to transport the mail between the cities of New Orleans and Mobile, the Postmaster General has considered it his duty to invite other proposals for the performance of the service which you have failed to accomplish agreeably to your engagements to do, and the route is now again advertised.

Respectfully, &c.,

P. BRADLEY.

Mr. THOS. RHODES,
Mobile, Alabama.

POST OFFICE DEPARTMENT, OFFICE OF MAIL CONTRACTS,
February 16, 1829.

SIR: On the 29th of December a letter was directed to be written to you, purporting that the Postmaster General could not pay you for opening the road; that expense he cannot meet in any case without a special law for the purpose; nor has he, in a similar case, recommended an appropriation for a similar road—that province belongs to your representative in Congress. Until this day I had thought that the letter was sent you on the 29th December, as it was directed to be done. The quarterly pay will be sent if the services are performed.

I am, sir, your obedient servant,

P. BRADLEY.

JEREMIAH AUSTILL, Esq.,
Mobile, Alabama.

POST OFFICE DEPARTMENT, OFFICE OF MAIL CONTRACTS,
October 7, 1828.

SIR: The Postmaster General has decided to accept your proposal to transport the mail by land and water between Mobile and New Orleans, at the rate of fourteen thousand dollars per annum. You will begin with all practicable expedition, and convey the mail upon a plan designated by the postmasters of Mobile and New Orleans. A contract will be made out and sent for you to execute.

Respectfully, &c.,

P. BRADLEY.

Mr. THOMAS RHODES,
Mobile, Alabama.

This contract, made the first day of October, in the year one thousand eight hundred and twenty-eight, between Thomas Rhodes and Jeremiah Austill, of Mobile, Alabama, contractors for carrying mails of the United States, of one part, and the Postmaster General of the United States of America, for and in behalf of the said States, of the other part, witnesseth: that the said parties have mutually covenanted as follows; that is to say: the said contractors covenant with the said Postmaster General—

1. To carry the mail of the United States, or cause it to be carried, from Mobile, by Pascagoula, to New Orleans and back, thrice a week, in stages and steamboats, at the rate of thirty-five hundred dollars for every quarter of a year, during the continuance of this contract; to be paid in drafts on postmasters on the route above mentioned, or money, at the option of the Postmaster General, in the months of May, August, November, and February.

2. That the mail shall be duly delivered at each post-office now established on any post-route embraced in this contract, or that shall be established during the continuance of this contract, under a penalty

of ten dollars for each offence ; and a like penalty shall be incurred for each quarter of an hour that shall elapse between the delivery of the mail and the period fixed for its delivery at any post office specified in the schedule hereto annexed ; and it is also agreed, that the Postmaster General may alter the times of arrival and departure fixed by said schedule, and alter the route, (he making an adequate compensation for any extra expense which may be occasioned thereby ;) and provided, that such alteration shall not require the mail to be conveyed at a greater rate than six miles in an hour ; and the Postmaster General reserves the right of annulling this contract, in case the contractors do not promptly adopt the alteration required.

3. If the delay of arrival of the said mail continue until the hour of departure of any depending mail, whereby the mails destined for such depending mail lose a trip, it shall be considered as a whole trip lost, and a forfeiture of one hundred dollars shall be incurred on any post-route embraced in this contract.

4. That the said contractors shall be answerable for the persons to whom they shall commit the care and transportation of the mail, and accountable for any damages which may be sustained through their unfaithfulness or want of care.

5. That seven minutes after the delivery of the mail at any post office on the aforesaid route not named in the annexed schedule, shall be allowed the postmaster for opening the same, and making up another mail to be forwarded.

6. That if the mail aforesaid shall be conveyed past any post office without stopping the time allowed the postmaster for opening and making up a mail, unless sooner discharged by the postmaster, a forfeiture of ten dollars shall be incurred for every such failure.

7. That if the contractor, post rider, or driver, to whom the transportation of the said mail is committed, do proceed without it, or do not make a proper exchange of the mails where such exchange is statedly to be made, or, instead thereof, shall carry back the same mail which he or they brought to such place of exchange, it shall be considered as a whole trip lost, and a penalty equal to the forfeiture stipulated in the third article of this contract shall be incurred.

8. That upon reasonable complaint made by the Department of the General Post Office against any carrier of the said mail, for negligence or misbehavior, such carrier shall be forthwith discharged.

9. That when the said mail goes by a stage-wagon, it shall invariably be carried within the body of a comfortable stage, (or in a secure and dry boot under the driver's feet,) suitable for the accommodation of at least seven travellers, under a penalty of fifty dollars for each offence ; and when it is carried on horseback, or vehicle other than a stage, it shall be covered securely with an oil-cloth, or bear-skin, against rain or snow, under a penalty of twenty dollars for each time the mail is wet, without such covering ; and for a second offence in permitting the mail to be injured by carrying it contrary to the stipulations before recited, the Postmaster General shall have a right to annul this contract ; and when it stops at night, it shall be put in a secure place, and there be locked up, at the contractor's risk, unless it is deposited in a post office.

10. And if any delay shall occur, equal to a trip lost, the Postmaster General, when satisfied that such delay has arisen from negligence or misconduct, shall have full right to annul this contract.

11. The forfeitures and penalties before mentioned are to be deducted out of the pay of the contractor if there shall be so much due; but if there be not so much due, the contractor and sureties hereby promise to pay their amount to the said Postmaster General, on demand, for value received: *Provided*, That the whole forfeiture and penalties to be incurred in the course of any one trip shall not exceed the sum specified in the third article.

12. If the contractors shall make it appear to the Postmaster General that the delay, failure, or other breach of contract, arose from insurmountable casualty or a public enemy, then no more than half the amount of the said forfeitures and penalties shall be deducted or paid; but it is expressly agreed and understood, that where there is no performance there shall be no pay or compensation.

13. And the said Postmaster General covenants with the said contractors to provide portmanteaus and bags necessary for containing the letters and newspapers which constitute the aforesaid mail, and pay the said contractors as aforesaid, for the carriage thereof as aforesaid, at the rate aforementioned, quarterly, in the months of May, August, November, and February.

14. It is mutually understood by the contracting parties, that if the route, or any part of the route, herein mentioned, shall, previous to the expiration of the contract, be discontinued by act of Congress, or a line of stages shall be established on the whole or any part of it, the mail not being carried by stage under this contract, that then this contract, or such part of it as is discontinued, or on which stages shall be established, shall cease to be binding on the Postmaster General, he giving one month's notice of such event, and making an allowance of one month's extra pay.

Provided always, That this contract shall be null and void in case the said contractors shall become members of Congress; and also, in case any member of Congress is, or shall become, directly or indirectly, himself, or by any other person whatsoever in trust for him, or for his use or benefit, or on his account, interested herein, in the whole or in part; and this contract shall, in all its parts, be subject to the terms and requisitions of an act of Congress passed on the twenty-first day of April, in the year of our Lord one thousand eight hundred and eight, entitled "An act concerning public contracts."

And it is mutually covenanted and agreed by the said parties, that this contract shall commence on the fifteenth day of December next, and continue in force until the first day of November, inclusively, which will be in the year one thousand eight hundred and thirty-two.

In witness whereof, they have hereunto interchangeably set their hands and seals, the day and year first above written.

THOMAS RHODES. [L. S.]
JEREMIAH AUSTILL. [L. S.]

Signed, sealed, and delivered in presence of—

WM. D. STONE, *witness for T. Rhodes.*

SCHEDULE.

Leave Mobile every Monday, Thursday, and Saturday, at 10½ a. m.; arrive at New Orleans on Tuesday, Friday, and Sunday by 2 p. m. Leave same every Tuesday, Friday, and Sunday at 10 a. m.; arrive at Mobile on Thursday, Saturday, and Monday by 2 p. m.

We, Thomas Rhodes and Jeremiah Austill, being appointed mail contractors, do swear, that we will faithfully perform all the duties required of us, and abstain from everything forbidden by the law in relation to the establishment of post offices and post roads within the United States. And we do solemnly swear that we will support the constitution of the United States.

THOMAS RHODES.

Sworn before the subscriber, a justice of the peace for the county of Mobile, Alabama, this 2d day of April, A. D. 1829.

BASIL MESTOR, J. P.

Know all men by these presents, That we, Thomas Rhodes and Jeremiah Austill, as principals, are held and firmly bound unto the Postmaster General of the United States of America, in the just and full sum of fourteen thousand dollars, value received, to be paid unto the Postmaster General, or his successors in office, or to his or their assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals: dated the 30th day of March, in the year of our Lord one thousand eight hundred and twenty-nine.

The condition of this obligation is such, That whereas the above bounden Thomas Rhodes and Jeremiah Austill, by a certain contract, bearing date the first day of October, in the year of our Lord one thousand eight hundred and twenty-eight, covenanted, with the said Postmaster General, to carry the mail of the United States, or to cause it to be carried, from Mobile to New Orleans, as per contract annexed, during the term of ———, commencing the fifteenth day of December, one thousand eight hundred and twenty-eight, and ending the first day of November which will be in the year one thousand eight hundred and thirty-two.

Now, if the said Thomas Rhodes and Jeremiah Austill shall well and truly perform the covenants in the said indenture expressed, on their part to be performed, and repay all advances that may be made, then this bond is to be void; otherwise to remain in full force.

THOMAS RHODES.	[L. s.]
JOHN CRAWFORD.	[L. s.]
BENJ. WILLIAMSON.	[L. s.]
ROBT. WILLIAMSON.	[L. s.]

Signed, sealed, and delivered in presence of—
WM. D. STONE.

POST OFFICE DEPARTMENT,
June 17, 1828.

Proposals will be received at this department until the 1st of October next, for the conveyance of the mail thrice a week between Mobile, Alabama, and New Orleans, Louisiana, in steamboats; the mail to be carried from city to city within thirty hours, and the service to commence on the 1st of November, and continue four years.

JOHN McLEAN.

POST OFFICE DEPARTMENT,
Office of Mail Contracts, February 16, 1829.

SIR: On the 29th of December a letter was directed to be written to you, purporting that the Postmaster General could not pay you for opening the road; that expense he cannot meet in any case, without a special law for the purpose; nor has he in a similar case recommended an appropriation for a similar road: that province belongs to your representative in Congress. Until this day, I had thought that the letter was sent you on the 29th of December, as it was directed to be done.

The quarterly pay will be sent if the services are performed.

Respectfully, &c.,

P. BRADLEY.

JEREMIAH AUSTILL, Esq.,
Mobile, Alabama.

POST OFFICE DEPARTMENT,
Office of Mail Contracts, February 16, 1829.

SIR: It was supposed that you were informed on the 29th of December (as it was the intention of the department at the time) that the department possessed no means to remunerate you for any expense that you may have incurred in the improvement of the road, and it was hoped that the company referred to in your letter of the 11th of December would be more reasonable in their tolls.*

Respectfully, your obedient servant,

P. BRADLEY.

JEREMIAH AUSTILL, Esq.,
Mobile, Alabama.

* As it appears you addressed a letter to Mr. Owen at the time you did the department, it is hoped that he has attended to it, as Congress can alone grant you relief.

RHODES & AUSTILL vs. THE UNITED STATES.

Opinion of the court on the evidence, delivered by Chief Justice Gilchrist.

Depositions have been taken in this case, the substance of which is as follows :

Ursin Rabby deposes that there were no roads suitable for stages in the years 1828 and 1829, between Mobile and Pascagoula, and claimants were obliged to make, and did make, one whereon to convey the mails. This was done about twenty-eight years ago. He was employed by the claimants to work on the road while it was being made, and though he does not know its actual expense, he is satisfied from his knowledge of the country over which it was made, and of the work done upon it, that it could not have been done for less than \$7,500. The road was used by subsequent contractors in transporting the mails between Mobile and New Orleans, until the route was changed to one by water.

Lemuel Childers deposes that there was no road at all when the claimants became contractors, that it would be possible for a coach to travel on. They built a road, and when completed they transported the mail on it. He superintended the work upon the road as overseer. The contractors were engaged in building the road from November, 1828, to some time in July, 1829, and he thinks it must have cost \$7,000. He worked on the road four weeks as overseer, and during that time there were, upon the average, twenty hands engaged upon it. After he ceased to be overseer, he lived on the road and had business upon it, and knows that they continued to work on it, and carried the mail. The bridges were not built by the hands working on the road, but were built by contract, with the exception of one. The greater part of the road was used by subsequent contractors in transporting the mail, and continued to be used until the route was changed to that by water.

Walter Drane says that there was no road at all suitable for transporting the mail, and the claimants were obliged to construct a road; and when it was completed, which was in 1828, the mail was transported on it until about May, 1829. The first construction of the road cost the claimants \$4,000, exclusive of ditches and causeways. After the road was opened and winter had set in, a full third of the road had to be ditched and causewayed, to enable the stages to pass over it; and owing to the unfavorable country over which it ran, lighter vehicles had to be procured by the contractors than they had begun to use at first. All this cost them \$4,000 more, making the whole cost incurred by them \$8,000. He is well acquainted with the road, and is satisfied that \$8,000 would be no more than a fair compensation for the labor and money put upon it.

Among the papers transmitted to us by the House, there are copies of letters, constituting a voluminous correspondence with the department, on the subject of this mail route. On the 1st of August, 1828, the honorable John McLean, then Postmaster General, wrote to the postmaster at New Orleans, desiring him to examine the route from Mobile to Pascagoula, in connexion with the postmaster at Mobile, and

saying, among other things, "in making your arrangements, it would be well to ascertain the quality of the ground on which the road is now opened, or may be located; also, the expense that may be necessary to make it a good road for stages."

This information could have been useful only upon the supposition that the expense would properly be considered in determining the amount of compensation to be paid for transporting the mail.

Prior to the 7th of October, 1828, the postmasters of Mobile and New Orleans made a report on the subject, which met with the approbation of the Postmaster General.

On the 10th of August, 1828, the claimants proposed to carry the mail for the sum of \$14,000 per year, "the road from here (Mobile) to Pascagoula to be made by or at the expense of the United States. The road I will be obligated to make within sixty days from the time I may receive the notice, for the sum of \$4,000." On the 7th of October the department decided to accept his "proposal to transport the mail by land and water," as hereinbefore stated.

The claimants thereupon proceeded to make the road, and completed it according to the offer, and commenced running the mail on the 17th of December. They had no reason to think the Postmaster General entertained any doubt about his power. They had no reason to believe that he did not think he had the power to build the road at the expense of the United States, according to their proposition of the 10th of August. On the 8th of October, the day after the date of Mr. Bradley's letter of acceptance, Austill wrote the Postmaster General that he had been informed by Mr. Owen (a representative from Louisiana) that the department thought they had no power to contract for building the road to Pascagoula. He then said: "Therefore, to obviate the difficulty that may exist thereby, I will make another proposal, if it should not be too late, in behalf of myself, Thomas Rhodes, William Mathison, and Robert Williamson, all of this State; and that is, we will transport the mail, within the time and manner first proposed, at the following rates, to wit: for the first year at \$18,000, and each of the succeeding three years at \$14,000 per annum." This was, in substance, the first proposal.

After Mr. Bradley's letter of the 8th of October, accepting the first proposal, nothing further was said by the department until Mr. Bradley's letter of the 16th of February, 1829, in which he says to Austill, that on the 29th of December a letter was directed to be written to him, purporting that the Postmaster General could not pay him for opening the road. He also says, "that expense he cannot meet in any case without a special law for the purpose, nor has he in a similar case recommended an appropriation for a similar road; that province belongs to your representative in Congress. Until this day I had thought that the letter was sent you on the 29th of December, as it was directed to be done."

Even if the letter had been written on the 29th of December, it would have been too late, for the road had already been built by the claimants a fortnight before, and the mails had been transported upon it.

On the 23d of March, 1848, Judge McLean wrote the Hon. John Rep. C. C. 28—4

Gayle: "The construction of the road was important to the public, as it shortened the distance of the most important southern route from New Orleans. It is probable that more was saved to the public by the establishment of the road, in the transmission of the mail over it for four years, than would pay the cost of its construction. In addition to this, the increased speed with which the mail was conveyed between New Orleans and Mobile was important to the commercial interests of those cities, and of all other places connected with them. Mr. Rhodes seems to have a strong equitable claim, and I trust it will be duly considered by Congress."

On the 2d of February, 1830, Mr. Bradley, Assistant Postmaster General, wrote to Mr. King, of the Senate, that the making of this road "was of great public importance, as it was essentially necessary to carry the object Congress had in view, viz: the establishment of a mail route on which reliance could be placed;" that Judge McLean would promptly have reimbursed the expense if he had had the power so to do; that the road has been used as a public and national road ever since it was opened, and has essentially contributed to the speedy and certain transmission of the mail between all the Atlantic States and New Orleans; that he knows of no claim upon the government which appears to him more equitable than the present claim; and he says, "I flatter myself that the proper authority will do this gentleman justice."

On the 29th of March, 1854, Mr. Adams, from the Committee on the Post Office and Post Roads, in the Senate, made a report in favor of this claim. The argument of the report is as follows: "He (the claimant) claims that his proposal for carrying the mail four years for \$14,000 per annum, was connected with a condition which, from the nature of the case, could not be separated from it, namely, that the United States were to open the road, or agree to pay him \$4,000 for doing it. The Postmaster General adopted or established the mail route by Pascagoula, and accepted the proposal of the petitioner for carrying the mail upon it, without saying anything in regard to that part of the proposal of the petitioner which related to opening the road, although he must have known that the mail could not be conveyed on that route without the road being opened. Did not the acceptance by the Postmaster General of that part of the proposal by the petitioner which related to carrying the mail, which he knew could not be performed without the road being first opened, authorize the petitioner to believe that if he constructed the road he would, in some way, be paid for it? It appears to the committee that it did, and that there was an implied or tacit engagement that the petitioner was, in some way, to be remunerated for his expense in opening the road. It does not appear from any of the correspondence that the department ever claimed or expected that the contractors were to construct the road at their own expense. Was it just or strictly honest in the government to accept one part of the proposition for a contract consisting of two parts, when they knew that the part accepted would not have been offered but in connexion with the part which was not accepted?"

Upon the argument of this case the question made was as to the

power of the Postmaster General, under the resolution of May 24, 1828, to pay for making the road. As we have before said, the resolution authorized him to adopt the route if he should deem it the most expedient route. He thought it was the most expedient route. Now, to adopt a route for the transportation of the mail where there is no road, means to take the steps necessary to enable the mail to be transported, otherwise the resolution will amount to nothing. The Postmaster General might decline to pay the expense of making the road upon the ground that he had no funds which could be appropriated for that purpose, but it by no means follows that the claimant had not a legal cause of action against the United States. As the resolution authorized the making of the road, its effect was to give validity to the claim of the person who should make it. Any other conclusion would be such a violation of common honesty as would seriously injure the reputation of an individual in the business relations of life. If this were a suit between individuals, and if the plaintiff had performed labor for a defendant under such circumstances, and the latter had received the benefit of the services without objection, no one would venture to deny that in law and justice alike the plaintiff should be compensated. This principle lies at the foundation of all pecuniary transactions between the citizens of the United States, and it is surely not unreasonable that it should be applied to the dealings between the government and its citizens. In this case the government received the benefit of the labor of the claimant in making the road, and should, upon principles of law and justice, make compensation for it to the claimants.

The evidence proves that the expense of building the road was \$8,000 ; but as the proposal of the claimant was to build it for the sum of \$4,000, he should be limited to that sum. This will place him in as good a position as if his proposal had been accepted in terms, so far as relates to the compensation for building the road ; and for that sum we report a bill.

The claimants also allege that they are entitled to damages consequent upon the annulment of their contract by the department. But as there is no evidence upon this point, it is not necessary to investigate it.

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FRANCIS A. GIBBONS AND FRANCIS X. KELLY.

[To accompany bill C. C. No. 16.]

JULY 25, 1856.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of Gibbons and Kelly *vs.* the United States:

1. The petition of the claimant.
2. Claimant's brief on the petition.
3. Solicitor's brief on same.
4. Opinion of the court on the petition, in which testimony was ordered to be taken.
5. Printed copy of the depositions in the case.
6. Claimant's brief on the facts.
7. Solicitor's brief on same.
8. Opinion of the court on the facts.
9. Judge Blackford's dissenting opinion.
10. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this tenth day of July,
[I. S.] A. D. 1856.

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Court of Claims:

The petition of F. A. Gibbons and F. X. Kelly, of Baltimore, Md., respectfully represents that on the 30th of April, 1852, your petitioners entered into a contract with the Secretary of the Treasury for the erection of certain light-houses on the Pacific coast, to wit, seven within the State of California, and one in Oregon, a copy of which contracts, and modifications thereof, is herewith filed, as part hereof. That your petitioners having given the necessary bond, proceeded with due diligence to execute the work, and, in accordance with the stipulations in the contract, procured the materials therein mentioned in the city of Baltimore, and gave due notice to the Secretary of the

Treasury that they were ready to be delivered for shipment. Said materials were thereupon, to wit, on the 5th of August, 1852, shipped, insured, and assigned to the Secretary of the Treasury, as above required, as will appear by the invoices and policies of insurance referred to on pages 66, 67, 68, 69, and 70 of Ex. Doc. No. 53 of Senate herewith filed.

Your petitioners further show, that by said written contract the right was reserved to the United States to substitute, at their own cost, the French lens in place of the lantern and illuminating apparatus mentioned in said contract, which right the government afterwards availed itself of, through its proper officers, and substituted the French lens and lanterns. And the Acting Secretary of the Treasury required your petitioners to assign, and they did assign, to the government, by way of indemnity for the advance or pre-payment of the sum of \$35,000 on their said contract, the policies of insurance and bills of lading, not only for the "fixtures, oil vessels, tin, and all the wood work, except the joists and rafters," but for all and every material shipped by your petitioners for California, and designed for use in the construction of said light-house. The list and value of said articles so shipped and assigned to the government will be found on page 70 of Ex. Doc. No. 53, (Senate,) herewith filed as part of this petition. Your petitioners therefore consider that all of said articles were placed by them in the custody and care of the government, under the requirement of its officers, and of said contract. That said goods were transported at the expense of the government in the barque Oriole to San Francisco, and there delivered to the collector of customs of that port.

In accordance with the stipulation in the contract, the said collector, upon being required by your petitioners to deliver said materials at the different points, entered into a charter-party with your petitioners, as will appear on page 20 of said document No. 53. Prior to the making of this charter-party, your petitioners performed, at their own cost, the transportation for the two light-houses on Battery Point and Alcatraz island. Your petitioners afterwards proceeded under the charter-party, and performed the transportation for the light-houses at Monterey and Farallones, and on the way to Cape Disappointment said vessel was wrecked, and the materials on board, being principally those for four light-houses, totally lost. That said goods were *the property of the government*; and if not, were at the time of the loss in the exclusive possession and charge of a government officer, on board for that purpose, as will appear from his affidavit on page 51 Ex. Doc., and they were therefore at the risk of the government under all the circumstances.

Your petitioners further show that by the express contract of the United States, and the requirement of the Secretary of the Treasury, they received into their sole and exclusive possession and control all the articles and materials enumerated in the list aforesaid, and belonging to your petitioners. That the same was so received by the United States, as aforesaid, to secure the due performance of the contract by your petitioners; and in consideration of such delivery into the possession of the United States, and of the assignment of the policy

of insurance and bills of lading therefor, the United States undertook and stipulated to transport said articles and materials to San Francisco, and to retain possession thereof until delivered at the several points where the same were to be used, and further undertook to transport the same under the authority of the collector of customs for the port of San Francisco, when required by your petitioners, in a revenue cutter or other vessel.

That the government thus took charge of said articles and materials, and stipulated to deliver them to your petitioners at the several points where the same were required for use under said contract.

Your petitioners are advised and charge, that by reason thereof the government was absolutely bound to deliver, under all circumstances, the articles and materials aforesaid, or other articles of similar character and description, and of equal value, at said points where the same were to be used, or to pay to your petitioners all such damages as they might sustain by reason of the failure so to deliver said articles and materials.

Your petitioners further charge, that said articles and materials were, under all the circumstances, at the risk and peril of the government, especially while being transported from San Francisco under the authority of the collector in the vessel so chartered by him. That the government became and was the charterer and hirer of said vessel, and had the exclusive management and control thereof, and of the master and crew thereof; while your petitioners, as owners thereof, also hired the services of said master and crew to the government as the charterer of said vessel, and as such owners covenanted that they would land and deliver said articles and materials, operatives and artisans, at the points which might be selected by the agents of the government for the sites of said light-houses. And your petitioners are advised, that under the terms of said charter-party, and other circumstances of the case, the government became and was the hirer of said vessel for the purpose of transporting said articles and materials, as it was bound to do; and your petitioners are in no way chargeable with the loss thereof by shipwreck or other perils of the seas. That even if your petitioners, as owners of the Oriole, were bound as common carriers, they are not chargeable with any loss occasioned by perils of the seas.

That it became and was the duty of the government to cause said materials and articles to be insured from San Francisco, but failed to do so. Your petitioners aver that the omission of the government so to insure the said goods and materials which it undertook for its own security to transport by sea, was a want of ordinary and reasonable care in the carriage thereof, by reason of which the United States became liable to make good the value thereof, in case of loss by the perils of the sea; and your petitioners charge that the same having been lost by shipwreck while in the care, custody and possession of the agents of the United States, the value thereof, and all damages resulting from such loss, are due to your petitioners by the government.

Your petitioners further show, that it was impossible to proceed with their work without these materials being replaced; that your petitioners were compelled to replace them at their own cost, and

with great difficulty to themselves. The amount or value of the goods and materials so lost will appear by invoice on page 70, Ex. Doc. 53, being one-half the amount originally shipped, \$11,542 50, the other half being used previously in the construction of four light-houses.

Your petitioners have never been paid any of this amount.

In consequence of the failure of the government to deliver the materials at Cape Disappointment, at the time required, the vessel being wrecked, your petitioners suffered a consequential and inevitable loss in wages of men, boarding and other expenses of men, of \$4,490, as will appear on page 122 of said Ex. Doc., and which said expenses were necessary and proper to be incurred to the due performance of their contract, and were incurred on the faith that the government would deliver said materials as agreed. By reference to the last mentioned stipulation, the court will see that the government were bound to transport the materials furnished by your petitioners to the points where they were to be used. Your petitioners applied to the collector of the port of San Francisco, the agent on the part of the government, named in the contract for the purpose, to transport said new materials, and were directed by said collector to have said transportation done themselves; he stating that the government would pay them for it. That your petitioners accordingly proceeded to perform such transportation with other vessels in the same manner, as performed previously, under the charter of the barque Oriole. The length of time occupied in the performance of this work, after the loss of the Oriole—being the transportation to the following four light-house sites: Cape Disappointment, 700 miles; Humboldt, 230 miles; Point Conception, 320 miles; Point Loma, 600 miles—was ten months, which will amount, at the rate of the charter-party on the Oriole, to \$30,000; of this amount, your petitioners have been allowed by the Secretary of the Treasury, and have received under protest, the sum of \$7,549, as will appear more fully on page 39, Ex. Doc., leaving due to them the sum of \$22,451.

Your petitioners have adopted for the transportation of materials and construction of the four light-houses erected by them, after the loss of the barque Oriole, the rates of compensation fixed by the charter-party, beginning for said rates at the expiration of a period of, say two months after said shipwreck, which period was a reasonable time to be allowed to your petitioners to return to San Francisco to purchase new materials and re-charter other vessels to perform the same services. That in adopting said rates of compensation, your petitioners show that this mode of transportation and rate of compensation were considered by two successive collectors of San Francisco as most economical and judicious for the government, and the same was sanctioned afterwards by the Secretary of the Treasury, though at first objected to by him.

Your petitioners have kept no separate or detailed statement of the actual expenses they incurred in transporting said materials, &c., because they supposed a fair and just compensation could be arrived at by the analogy afforded in the charter-party, by which the same services were agreed to be done for a stipulated price. Unless such analogy

be adopted, it is now impossible to ascertain what is a reasonable charge for the transportation and delivery of said articles and materials, at the points where used, except by the estimates of competent and skilful workmen employed on the spot by your petitioners, and which estimates will not materially vary from this rate of compensation; and your petitioners aver that they are entitled to a reasonable compensation for their services in this behalf, and in making such claim were not bound to keep any vouchers of their actual expenses.

Your petitioners further state, that with the approbation of the collector of the port of San Francisco, and previous to the making of the charter-party, they performed, at their own cost, the transportation for the two houses on Battery Point, and on Alcatraz island. The value of such service will appear in affidavits of Timanus, page 74; R. Mahon, page 63; Russell, page 50; Captain Moore, page 41; H. Hamilton, page 63, Ex. Doc. 53, and amounts to (\$3,000 each,) \$6,000. Of this amount there has been paid by the Secretary of the Treasury, under the protest of your petitioners, \$1,590, as will appear more fully on page 39, Ex. Doc., leaving due to your petitioners the sum of \$4,410, on that account, which they pray the court to award to them.

Your petitioners further state that the government were obliged by the following stipulation:

“And the said Thomas Corwin, Secretary of the Treasury, as aforesaid, for and on behalf of the United States, as aforesaid, agrees and stipulates, that upon the completion of the said several structures, according to the subjoined plans and specifications, with the exceptions indicated; and upon the delivery and setting up of the lighting apparatus according to the terms of this agreement, and the inspection and approval thereof by the collector of the district in which any of said structures may be situated, or other authorized agent of the Treasury Department, to be appointed by the Secretary of the Treasury, he, the said party of the second part, will cause to be paid to the said parties of the first part, or their assigns, the sum of one hundred and thirty-six thousand dollars. And the said party of the second part, for and on behalf of the United States, further agrees and stipulates, that upon the completion, as aforesaid, of each or any one or more of said structures, according to this agreement, the sum of fifteen thousand dollars is to be paid for each of those on the coast of California, and thirty-one thousand dollars for that in Oregon, with a reservation of twenty per cent. on the Oregon light-house, unless it be the last one completed.”

To pay specific amounts on the completion of each house and approval by inspector. That upon the completion of several of the structures, to wit, those on Point Conception, Point Loma, and Cape Disappointment, the government failed to provide an authorized inspector for a long time, though its agents were repeatedly notified of their completion, causing serious loss and damage to your petitioners, in consequence of their being compelled to wait, on heavy expense, until their work was finally inspected and accepted.

Your petitioners further pray the court to award interest at the

legal rates in California on those expenses, as the withholding of the money justly due by the government was a great injury to them.

Your petitioners state, that in the early part of the 1st session of the 33d Congress, in consequence of a disagreement as to the construction of the contract in several particulars between the Light-house Board and themselves, they presented a memorial to Congress for the purpose of settling those questions. See memorial, p. 8 of Ex. Doc. 53. That said memorial was referred to the Committee of Claims, and that committee made a report to the Senate reviewing at length all the questions in dispute and fully confirming the views of your petitioners. See report, p. 78, Ex. Doc. The committee, however, deeming action on some of the matters premature in consequence of the work being unfinished, referred the case back to the Secretary of the Treasury for future action.

Your petitioners having learned that the amounts unexpended of appropriations for these works were insufficient, submitted an estimate to the Secretary of the Treasury as the amount of a further appropriation supposed to be necessary to meet their claims upon the completion of the work. See estimate, p. 114, Ex. Doc. 53. Congress, after a full investigation, appropriated the exact amount as estimated by them to meet their claim. See wording of the appropriation, p. 2, Ex. Doc. 53.

On the 10th of November, 1854, your petitioners having then entirely completed their contract, and all of the structures having been accepted and approved by the proper officers of government, presented their account to the Treasury Department for the purpose of obtaining the benefit of said appropriation. See p. 73, Ex. Doc.

That the Secretary of the Treasury, after an examination of said account, awarded to your petitioners the sum of \$20,826 60, which they received under protest. See Ex. Doc., p. 40.

On the 10th day of January, 1855, the Senate of the United States passed a resolution requesting the Secretary of the Treasury to furnish the Senate with the original papers in relation to the claim of your petitioners, and other information relating thereto. See Ex. Doc., p. 1. To which call the Secretary made the report heretofore referred to, No. 53, since which time no further action has taken place.

Your petitioners are advised and charge, that by said appropriation of the specific amount claimed by your petitioners, Congress intended to make said appropriation as a specific satisfaction of the amount so claimed, and they charge that by the terms of such appropriation the Secretary of the Treasury has no discretion except that allowed in reference to Point Loma. That your petitioners are entitled to the whole amount of their said account, minus the reduction made therein by the Secretary of the Treasury, under the discretion delegated to him in respect to Point Loma, which will be hereafter shown.

Your petitioners aver and charge, that they are entitled, on an equitable settlement of accounts, to much more than the amount so appropriated, and that their said account fell short of their actual claim, owing to the fact that it was based on a prospective estimate by their superintendent; but they are willing, in order to avoid delay and expense, to accept the amount of said appropriation if the court

shall decree it to be due to them, upon the legal effect of the appropriation; but if the court does not so decree, then your petitioners claim the full amount of what they may establish as due to them on the annexed account.

Your petitioners herewith present, as part of this petition, the items of their account against the government.

They further state that they are the sole owners of said claim, and that it is based on the considerations above set forth. Your petitioners pray that their said claim may be investigated, and that they may have relief according to law and equity; and, as in duty bound, will ever pray.

ROBERT J. BRENT,
HENRY MAY,
for Petitioners.

STATE OF MARYLAND, }
Baltimore city, } *to wit:*

On this — day of May, 1855, before the subscriber, a justice of the peace in and for said city, personally appears F. X. Kelly, one of the above petitioners, and made oath on the Holy Evangely of Almighty God, that the facts stated in the foregoing petition are true to the best of his knowledge and belief. And at the same time appeared F. A. Gibbons, one of the above petitioners, and made oath that he has no personal knowledge of the matters which transpired in California, but he has been credibly informed that the facts as stated in the foregoing petition are true.

Memorandum of the Account of Gibbons & Kelly vs. United States.

1853.

DR.

Feb'y 7.	To transportation to site of light-house, on Alcatraz island, prior to date of charter-party	\$3,000 00
" "	To transportation to Battery Point ditto.....	3,000 00
Sept. 19.	To value of materials lost on board the Oriole, at Cape Disappointment.....	11,542 50
" "	To expenses in wages, board, and passages in consequence of failure to deliver materials at Cape Disappointment.....	4,490 00

1854.

Sept. 12.	To transportation to four light-houses, ten months, at rates of compensation agreed in charter-party of barque Oriole.....	30,000 00
October 1.	To time of W. J. Timanus and F. X. Kelly, detained in California, from July 15 to October 1, no inspector being there in time to receive the structures, at \$15 per day each	2,250 00
" "	Travelling expense incurred from same cause..	500 00

October 1.	To interest on \$22,371, due on Point Loma and Point Conception, payment withheld from same cause, 4 months and 20 days, till September 5, 1854, at 10 per cent. per annum	\$787 00
" "	Interest, at 10 per cent. per annum, on \$30,009 due on Cape Disappointment, 1 month and 13 days, from same cause, withheld till September 12, 1854.....	360 00
		55,929 50
1855.	CR.	
Jan'y 10.	By amount paid for transportation to Alcatraz	\$450 00
" "	By amount paid for transportation to Battery Point.....	1,140 00
" "	By amount paid for transportation to Point Conception.....	1,250 00
" "	By amount paid for transportation to Humboldt bay.....	1,138 00
" "	By amount paid for transportation to Point Loma.....	3,923 00
" "	By amount paid for transportation to Cape Disappointment.....	1,238 00
		9,139 00
		46,790 50

Mem.—Interest on amount due for transportation and materials not included, but will be claimed on the hearing.

BRIEF OF THE UNITED STATES SOLICITOR.

This is a claim for the item in the general appropriation act of August 4, 1854, ch. 242, to be found at p. 563 of the session acts, in these words: "For completing the light-houses on the coast of California and Oregon, the sum of fifty-nine thousand four hundred and thirty-four dollars: *Provided*, That it shall be the duty of the Secretary of the Treasury to pay the contractors for building the light-house on Point Loma, near San Diego, what the same is reasonably worth." It is alleged in the petition that this was a specific appropriation for their benefit, to satisfy the account rendered by them. (See p. 114, Ex. Doc. No. 53, 33d Con., 2d sess.) And it is insisted, that by the terms of the law the Secretary had no discretion as to the payment of any item of said account, except that relating to Point Loma, but that the Secretary allowed them only the sum of \$20,826 60 out of said appropriation, leaving a balance of \$38,607 40, which they claim to be varied only with respect to Point Loma; or if the court shall decide that said appropriation was not made in satisfaction or adjustment of their claims, but was merely provisional, and to admit

of the payment of that sum if the same should be allowed under the contracts with said petitioners with respect to all of said light-houses except that on Point Loma, with respect to which, by the effect of the *proviso*, the Secretary was at liberty to make a reasonable allowance without regard to the existing contract, then the petitioners insist that the account so rendered is not obligatory on them, and does not show the full extent of their rightful claim, which they allege amounts to \$46,790 30, with some interest.

The petitioners do not seem to anticipate, with any degree of confidence, that the court will hold that they are entitled, by the terms of the appropriation in question, to any amount; and I shall merely call the attention of the court to the letter of Mr. Guthrie which accompanied the estimate, whereby it appears that he submitted it at the solicitation of the claimants, in order to be in funds should the accounts and vouchers to be hereafter presented entitle them to the money; and to the fact admitted in the petition, that the account on which the appropriation was based was merely an estimate, although, at the same time, it is contended that by the force of the terms used it was adopted and recognised as an adjusted and liquidated account with respect to all, save Point Loma. The explanation of the proviso with respect to Point Loma, which is all that gives color to this construction, is found in the estimate (p. 116) and other papers in said document, from which it appears that the petitioners contended that the contract made with them for a light-house to be erected at San Diego did not apply to the light-house erected by them at Point Loma, at the mouth of the harbor, although by the contract they were to erect the lights at the points indicated by the officers of the Coast Survey, and this point was fixed upon and noted on the map, and communicated to the Treasury Department as the site of the San Diego light, five months before the contract was entered into. (See Doc. 53, pp. 172,-'3,-'4,-'5,-'6, and -'7.) But the contractors contending that the contract contemplated a building at San Diego, and not near San Diego, and urging that in fact the cost of a building at Point Loma was much greater than at San Diego, Congress, in the proviso in question, relieved them of the obligations of the contract so far as this light was concerned, and permitted the Secretary to pay what the work was reasonably worth; and this express exception as to Point Loma, so far from adopting their estimates of differences between the cost and contract price, and so legalizing their contemplated extra charges or pretensions in other respects, shows that the only question passed upon was, whether the site for the light-house at Point Loma should be insisted upon as that contracted for at San Diego.

The public history of this item in the appropriation is, therefore, perfectly consistent with its language, and it follows that the petitioners have no claim whatever for the amount, or to any greater portion of it than they can show themselves entitled to under their contract; and this brings me to consider the claim in that view.

The appropriations under which the Secretary of the Treasury was authorized to contract for these light-houses are, first, that contained in the act making appropriations for light-houses, &c., passed September 28, 1850, in which, at page 503, 9th vol. United States Laws,

is the following: "*In California*—For a light-house at Alcatraz island: for a light-house at Point Conception and a fog-signal; for a light-house on Battery Point, entrance of the bay of San Francisco; for a light-house at San Diego; for a light-house and a fog signal at Monterey; for a light-house at the island of Farallones, off the harbor of San Francisco, and a fog-signal, and for the *transportation, erection, and placing the same*, ninety thousand dollars. *In Oregon*—For a light-house on Cape Disappointment, at the mouth of the Columbia river; *one on an island off Cape Flattery, at the entrance of the straits of Fuca, and one at New Dungeness, twelve iron can-buoys in Columbia river, and the transportation, erection, and placing the same*, fifty three thousand one hundred and forty dollars."

Second. That at page 628, act 3d March, 1851, as follows: "*California*—For a light-house at Humboldt harbor, fifteen thousand dollars."

These appropriations, it will be observed, were intended to erect *ten* light-houses, and to pay for the transportation, erection, and placing the same; and the amount appropriated for the whole is \$148,140. The contract covered only eight of them, and for constructing these the sum of \$143,509 was agreed to be paid—\$15,000 each for those in California, and \$38,500 for the one in Oregon—leaving of the appropriation less than \$5,000.

The original contract was made on the 28th December, 1851, by Mr. Corwin, Secretary of the Treasury, with John McGinnis, at the time a clerk in that department. Some of the circumstances under which it was made—together with the fact that it was transferred to these claimants for \$15,000, which was advanced by the Secretary out of the appropriation; that they paid the person with whom they dealt an additional sum of \$900 for procuring a modification of the contract, amounting to about \$7,500 in the size or value of the contract—appear on their own evidence in Rep. No. 1, of Senate committee, special session, 1853, pp. 7 and 8.

A letter to Mr. Gibbons appears on page 8 of Ex. Doc. 53, concurred in by Mr. Borland, in which General Houston says: "The examination before the committee on 'frauds,' &c., in my opinion, did not implicate you or your partner in any respect. It was with you, as I conceive, from all the testimony, a transaction in good faith, and fair.

"The report as well as the evidence taken before the committee, will show that it was not the opinion of it that you were impeached in anything which you had to do with the 'light-house' contract."

But the committee say, page 9 of their report: "That after the sub-contractors had purchased this contract of the original contractor, by paying him \$15,000 for the privilege of taking his place in it, they obtained, through the agency of the same friend of the Secretary, whom he had introduced into the partnership with the clerk, and by whom the purchase had been negotiated, a modification of the contract in their favor to the amount of \$7,500, and for this agency they paid a fee of \$900."

The provisions in the several contracts in relation to transportation are found, first, in the contract of 30th April, 1852, p. 131, as follows:

“ And the said party of the second part further agrees and stipulates, that in case a revenue cutter or other public vessel of the United States should be proceeding to the Pacific coast at or about the time said above named illuminating apparatus, lantern, fixtures, fog-signals, oil-vessels, and tin, together with the entire wood-work of said several light-houses, except the joists and rafters, are ready for shipment, that the same will be taken on board of said vessel and delivered to the collector of San Francisco *free of charge to the said parties of the first part*; and in the event that no such vessel is sent as aforesaid, that then, and in that case, the said party of the second part will be bound to otherwise transport the said articles by other vessel or vessels free of freight to San Francisco, provided the entire freight on the wood-work does not exceed two thousand five hundred dollars, exclusive of the freight on the other articles; and provided further, that in case the said articles are transported by the parties of the first part, that the party of the second part will pay therefor, upon the production to him of the evidences of such shipment as hereinbefore mentioned, *the usual and customary cost of the freight thereof*.

“ And it is further agreed and stipulated, that the said articles so to be shipped as aforesaid are not to be delivered to the said parties of the first part at San Francisco, but the same are *to remain in the possession of the collector until delivered at the several points where the same are to be used*, and to which several places they are to be transported *under the authority* of said collector, when required by the said parties of the first part, *in a revenue cutter of the United States or other vessel*, the said parties of the first part being also required to *send therewith in said cutter a competent artisan and a sufficient number of workmen to place said apparatus and fixtures without unnecessary delay in the several towers erected for their reception*. It is to be understood, however, that in case the said parties of the first part shall prefer to ship the said illuminating apparatus, lantern, fixtures, fog-signals, wood-work, and other accessories, or any other part thereof, directly to the several points, and place the same in the several structures without going to San Francisco, that they, the said parties of the first part, shall have the right and privilege to do so.”

2d. In the memorandum dated 21st May, 1852, p. 134, as follows: “The said Gibbons and Kelly hereby yield their right under the contract hereby modified to furnish the lanterns, and *consequently their right to be reimbursed the cost of transportation thereof from the Atlantic coast to San Francisco*. The said second party (the United States) hereby agrees to deliver as needed, and in time for use, the said lanterns and lens at the several places needed and required. It is also agreed, *that unless said lens and lanterns shall in each case be delivered by said second party at the location needed in a revenue cutter or other government vessel, then, and in such an event, the first party shall have the right of transporting such lens and lanterns from San Francisco to the locality desired, and for such transportation shall be paid the usual and customary freight thereon*. This is in no wise to alter the original contract in regard to the transportation of other materials.”

3d. In the charter-party, dated 8th day of February, 1853, in which said Gibbons and Kelly, “parties of the first part, do covenant and

agree on the freighting and chartering of the said vessel to the said party of the second part, for the conveyance of materials for light-houses to Monterey, Point Conception, San Diego, the Farallones, Humboldt bay, the mouth of the Columbia river, and such other points as may be designated by the said party of the second part, or by the duly authorized agent of the United States government, on the terms following, that is to say :

“ *First.* The parties of the first part do engage that the said vessel, in and during the time she shall be thus employed, shall be kept tight, staunch, well fitted, tackled, and provided with every requisite, and with men and provisions necessary for such service.

“ *Second.* The said parties of first part do engage further to convey and provision such agents of the government, and such artisans and operatives as may be necessary, *to be transported with the materials* for the purpose of erecting the light-houses to be constructed.

“ *Third.* The said parties of the first part do engage further *to take and receive on board said vessel during the continuance of this charter all such materials as may be shipped by the party of the second part,* or the duly authorized agents of the United States government.

“ *Fourth.* The said parties of the first part do engage further *to land and deliver the materials, operatives, and artisans aforesaid, at the points which may be selected as the sites for the light-houses by the duly authorized agents of the United States government.*”

The remainder of the charter-party relates to the approval of the Secretary, and the amount to be paid by the United States.

On the 30th April, 1852, the petitioners were substituted for McGinnis in the contract for the erection of these light-houses; on 5th August shipped materials for them on barque “Oriole,” insured them, and assigned the policy and invoice to the United States, as security for the amount advanced—\$35,000.

On arriving at San Francisco, the collector chartered the barque to deliver the materials at the different sites, at the rate of \$3,000 per month; and after delivering the materials for four of the light-houses, and on the way with the materials for the others to Cape Disappointment, the vessel was wrecked and the materials lost.

It is claimed that the government shall pay for these materials, on various grounds. One argument is, that by virtue of the contract the articles were in the possession and custody of the United States, and they had obliged themselves to deliver them, *making no saving for dangers of the seas*, and thereby became insurers as well as carriers.

2. It is contended that the United States, being possessed of the property to secure them for their advances, were bound to take ordinary care of it; and that putting it on board ship, except when to be sent to its proper destination, was not such care.

3. That the goods were the absolute property of the government.

4. That notwithstanding the contractors, as owners of the “Oriole,” had covenanted to deliver the articles, yet the United States, being the hirer, was responsible for the loss.

I do not see the force of these positions; but their inconsistency with themselves is very apparent. Thus, whilst it is said the government is responsible as a common carrier, because there was no saving

as to dangers of the seas in their contract to deliver the articles, when in turn the contractors come under the same contract to the government in the charter-party, it is said *they* did not thereby assume equal responsibility.

As respects the second proposition. How can they be heard to object to the want of ordinary prudence and care in an arrangement for the storage of their property made by themselves, and evidently greatly for their advantage and convenience, with the collector of San Francisco?

The third proposition—that the property belonged to the government—is manifestly at variance with the facts.

The reasoning in the report of the Secretary of the Treasury, in Ex. Doc. 53, is conclusive as to this item of the claim, and that for damages consequent on it. I refer the court to that report on these points, and on the claims for transportation and other items in the account, and to the reports of Mr. Anderson, the Commissioner of Customs, in which these items are examined in detail. It is acknowledged by Mr. Gibbons, in a letter to Mr. Hodge, to be found in page 71 of Doc. 53. that whilst he was allowing \$15,000 of the appropriation to the negotiators of his contract, and whilst, by the terms of the contract, the government vessels were expected to do the *transportation*, there was at the time an understanding outside of the contract, that the contractors were to do it, and to that they looked as means of shielding themselves from the ruinous rates at which they had undertaken the construction of the light-houses. It was for the transportation, *therefore*—which they say in their argument, pages 140–1, “*was without limit*,”—they looked to reimburse themselves for the \$15,000 they surrendered to the negotiators, and to make profits on a job they had taken at rates so ruinously low.

But as this understanding is no part of the written contract, and as it was their own fault—to call it by no worse a name—that they consented to such an arrangement to indemnify themselves for the amount paid the negotiators, and the low rates at which the contract to erect the light-houses were undertaken, they cannot expect any greater allowance for the freight than was actually expended, and a reasonable allowance for their trouble and care. This, it will be found on examining the reports of Mr. Anderson, he has endeavored to do, allowing many items without proper vouchers, and manifesting in everything a most liberal disposition in the adjustment of the account, although in its origin and progress, in the temper and the means by which it has been pressed, there has certainly been enough to provoke the strictest scrutiny from the Treasury Department.

M: BLAIR.

OPINION OF JUDGE SCARBURGH.

The following opinion, in the case of Gibbons and Kelly *vs.* United States, was delivered by Judge Scarburgh, of the Court of Claims, January 8, 1856:

By the act of Congress approved September 28, 1850, entitled “An act making appropriations for light-houses, light-boats, buoys, &c.,

and providing for the erection and establishment of the same, and for other purposes," it was enacted "that the following appropriations be, and the same are hereby, made, and directed to be paid out of any money in the treasury not otherwise appropriated, to enable the Secretary of the Treasury to carry the provisions of this act into effect." 9 Stat. at Large, 500. Amongst the appropriations therein mentioned are the following:

"*In California.*—For a light-house at Alcatraz island; for a light-house at Point Conception, and a fog-signal; for a light-house on Battery Point, entrance of the bay of San Francisco; for a light-house at San Diego; for a light-house and fog-signal at Monterey; for a light-house at the island of Farallones, off the harbor of San Francisco, and a fog-signal; and for the transportation, erection, and placing of the same, ninety thousand dollars.

"*In Oregon.*—For a light-house on Cape Disappointment, at the mouth of the Columbia river; one on an island off Cape Flattery, at the entrance of the straits of Fuca, and one at New Dungeness; twelve iron can buoys in Columbia river, and the transportation, erection, and placing the same, fifty-three thousand one hundred and forty dollars."—*Ibid.*, 503.

By a similar statute, with the same title, approved March 3, 1851, the following appropriations were made:

"*Oregon.*—For a light-house and fog-signal at Umpqua, fifteen thousand dollars; for fog-signals for the light-house at Cape Disappointment, Cape Flattery, and New Dungeness, three thousand dollars.

"*California.*—For a light-house at Humboldt harbor, fifteen thousand dollars."—*Ibid.*, 628.

On the 30th day of April, A. D. 1852, a contract was made between the petitioners, of the first part, and the Secretary of the Treasury, for and on behalf of the United States, of the second part. It recited as follows: "Whereas by an act of Congress, approved September 28, 1850, there was appropriated for a light-house at Alcatraz island; for a light-house at Point Conception, and a fog-signal; for a light-house at Battery Point, entrance of the bay of San Francisco; for a light-house at San Diego; for a light-house and fog-signal at Monterey; for a light-house at Farallones, off the harbor of San Francisco, and a fog-signal, in the State of California, and for the transportation, erection, and placing the same, the sum of ninety thousand dollars; and by the act of 3d March, 1851, for a light-house at Humboldt harbor, in said State of California, the sum of fifteen thousand dollars; and by both of said acts for a light-house and fog-signal at Cape Disappointment, in the Territory of Oregon, appropriations were also made.

"And whereas the said parties of the first part have undertaken, and hereby agree and contract, to erect the said several light-house structures above mentioned, at the several points already indicated, or to be indicated, as the sites thereof, by the officers of the Coast Survey, of either brick or stone, as *they* may elect, upon the plans and according to the printed specifications hereto attached, except that the best quality of lime and sand-mortar may be substituted for

cement, and in the structure to be erected at Cape Disappointment the tower to be detached from the keeper's dwelling, as recommended by the report of Lieutenant A. M. Harrison; and that the heaviest description of tin, prepared and painted in the best mode, be substituted for slate in the construction of the roofs of the several structures, and to finish and complete the same on or before the first day of November, 1853."

Then follow covenants by the petitioners for the fitting up of the illuminating apparatus, the particulars of which it is not necessary now to mention. The contract contains the following additional stipulations:

"And it is understood and agreed that the party of the second part is to have the privilege of furnishing any or all of said light-houses with the French lens, instead of the apparatus hereinbefore described, at the proper cost and charges of the United States, and that in such case the parties of the first part will deduct from the gross sum of this contract the cost of the lighting apparatus herein stipulated to be furnished by them: and it is further agreed that the party of the second part may, at its option, dispense with the erection of the several fog-signals hereinbefore mentioned, and that in such an event the cost of them is to be deducted from the gross amount of this contract. And the said Thomas Corwin, Secretary of the Treasury, as aforesaid, for and on behalf of the United States, as aforesaid, agrees and stipulates that upon the completion of the said several structures according to the subjoined plans and specifications, with the exceptions indicated, and upon the delivery and setting up of the lighting apparatus according to the terms of this agreement, and the inspection and approval thereof by the collector of the district in which any of the said structures may be situated, or other authorized agent of the Treasury Department, to be appointed by the Secretary of the Treasury, he, the said party of the second part, will cause to be paid to the said parties of the first part, or their assigns, the sum of one hundred and thirty-six thousand dollars. And the said party of the second part, for and on behalf of the United States, further agrees and stipulates that, upon the completion as aforesaid of each or any one or more of said structures according to the agreement, the sum of fifteen thousand dollars is to be paid for each of those on the coast of California, and thirty-one thousand for that in Oregon, with a reservation of twenty per cent. on the Oregon light-house, unless it be the last one completed.

"And it is further agreed between the parties to this contract that, in consideration of the advances of money to be made by the parties of the first part for the illuminating apparatus and other materials for the said several light-houses to be sent from Atlantic ports, as soon as the said illuminating apparatus, lantern fixtures, fog-signals, oil vessels, and tin are shipped and insured, and the policy of insurance is assigned and delivered, accompanied by a duplicate of the bill of lading to the said party of the second part, and upon the execution and delivery of a penal bond in the sum of seventy-five thousand dollars, with security, to the satisfaction and approval of the said party of the second part, conditioned for the faithful execution

of this contract on the part of the said parties of the first part, he, the said party of the second part, will thereupon pay and advance to the said parties of the first part, or their order, the sum of thirty-five thousand dollars; and the said party of the second part further agrees and stipulates that, in case a revenue cutter, or other public vessel of the United States, shall be proceeding to the Pacific coast at or about the time said above-named illuminating apparatus, lantern, fixtures, fog-signals, oil vessels, and tin, together with the entire wood-work of said several light-houses, except the joists and rafters, are ready for shipment, the same will be taken on board of said vessel and delivered to the collector of San Francisco free of charge to the said parties of the first part; and in the event that no such vessel is sent as aforesaid, that then, and in that case, the said party of the second part will be bound to otherwise transport the said articles by other vessel or vessels free of freight to San Francisco, provided the entire freight on the wood-work does not exceed two thousand five hundred dollars, exclusive of the freight on the other articles; and provided, further, that in case the said articles are transported by the parties of the first part, the party of the second part will pay therefor, upon the production to him of the evidences of such shipment as hereinbefore mentioned, the usual and customary cost of the freight thereof.

"And it is further agreed and stipulated that the said articles so to be shipped as aforesaid are not to be delivered to the said parties of the first part at San Francisco, but the same are to remain in the possession of the collector until delivered at the several points where the same are to be used, and to which several places they are to be transported under the authority of said collector, when required by the said parties of the first part, in a revenue cutter of the United States, or other vessel; the said parties of the first part being also required to send therewith in said cutter a competent artisan and a sufficient number of workmen to place said apparatus and fixtures, without unnecessary delay, in the several towers erected for their reception. It is to be understood, however, that, in case the said parties of the first part shall prefer to ship the said illuminating apparatus, lantern, fixtures, fog-signals, wood-work, and other accessories, or any other part thereof, directly to the several points, and place the same in the several structures without going to San Francisco, they, the said parties of the first part, shall have the right and privilege to do so.

"It is further understood that the advance payment of thirty-five thousand dollars herein provided for is to be deducted from the specific payments upon each light-house, as the same are respectively finished, in a *pro rata* proportion—that is to say, three thousand eight hundred and sixty dollars of the said advance payment are to be deducted from the price of each of the several light-houses in California, and the sum of seven thousand nine hundred and eighty dollars from the price of that in Oregon."

This contract was subsequently modified in certain respects, which need not for the present be particularly noticed.

The petitioners allege "that the Acting Secretary of the Treasury

required them to assign, and they did assign to the government, by way of indemnity for the advance or prepayment of the sum of \$35,000 on their said contract, the policies of insurance and bills of lading, not only for the fixtures, oil vessels, tin, and all the wood-work, except the joists and rafters, but for all and every material shipped by your petitioners for California, and designed for use in the construction of said light-houses." They further allege "that said goods were transported at the expense of the government in the barque Oriole to San Francisco, and there delivered to the collector of customs of that port." These allegations, at the present stage of this cause, must be taken to be true.

By the act of Congress approved August 31st, A. D. 1852, with the same title as the act first above mentioned, approved September 28th, A. D. 1850, the following appropriation was made: "For the completion of light-houses in California and Oregon, one hundred and twenty thousand dollars."—10 Stat. at Large, 118.

On the eighth day of February, A. D. eighteen hundred and fifty-three, a charter-party was entered into between the petitioners, owners of the barque Oriole, of the first part, and Beverly C. Sanders, collector of the port of San Francisco, acting on behalf of the government of the United States, of the second part. It contains the following stipulations: "That the said parties of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, do covenant and agree, on the freighting and chartering of the said vessel to the said party of the second part, for the conveyance of materials for light-houses to Monterey, Point Conception, San Diego, the Farallones, Humboldt bay, the mouth of Columbia river, and such other points as may be designated by the said party of the second part, or by the duly authorized agent of the United States government, on the terms following—that is to say:

"First. The parties of the first part do engage that the said vessel, in and during the time she shall be thus employed, shall be kept tight, staunch, well fitted, tackled, and provided with every requisite, and with men and provisions necessary for such service.

"Second. The said parties of the first part do engage further to convey and provision such agents of the government, and such artisans and operatives as may be necessary, to be transported with the materials for the purpose of erecting the light-houses to be constructed.

"Third. The said parties of the first part do engage further to take and receive on board said vessel, during the continuance of this charter, all such materials as may be shipped by the party of the second part, or the duly authorized agents of the United States government.

"Fourth. The said parties of the first part do engage further to land and deliver the materials, operatives, and artisans aforesaid, at the points which may be selected as the sites for the light-houses by the duly authorized agents of the United States government.

"Fifth. The said parties of the first part do engage further that this charter-party is to continue until the whole of the materials are transported to the sites where the light-houses are to be erected, and

is to terminate as soon as all the materials are delivered in pursuance of its requirements: *Provided, however*, That this charter shall be approved by the Secretary of the Treasury; and if it shall not be approved by the said Secretary, then it shall cease and terminate on the day when notice of the disapproval of the said Secretary shall be received by the said parties of the first part, or either of them, or on such day as the said Secretary shall designate after the receipt of the notice by the parties of the first part.

"And the said party of the second part, on behalf of the United States government, for and in consideration of the covenants and agreements to be kept and performed by the said parties of the first part, does covenant and agree with the said parties of the first part to charter and hire the said vessel as aforesaid, and to pay to the said parties of the first part, or their agents, for the charter or freight of the said vessel during the time the said vessel may be engaged under this charter, the sum of three thousand dollars for each and every month, payable monthly at the end of each and every month; it being understood and agreed upon that this charter shall commence from the day of the date hereof."

Before this charter-party was made, the petitioners "performed, at their own cost, the transportation for the two light-houses on Battery Point and Alcatraz island." Afterwards they "proceeded under the charter-party and performed the transportation for the light-houses at Monterey and Farallones, and on the way to Cape Disappointment said vessel was wrecked, and the materials on board, being principally those of four light-houses, totally lost."

In the early part of the first session of the Thirty-third Congress, the petitioners presented a memorial to the Senate of the United States. It was referred to the Committee of Claims, who made a report. They also submitted an estimate of the amount of an appropriation, supposed to be necessary to meet their claims, to the Secretary of the Treasury, who communicated it to Congress, and by the act of the 4th of August, A. D. 1854, the following appropriation was made: "For completing the light-houses on the coast of California and Oregon, the sum of \$59,434: *Provided*, That it shall be the duty of the Secretary of the Treasury to pay the contractors for building the light-house on Point Loma, near San Diego, what the same is reasonably worth." The sum thus appropriated was the exact amount of the estimate submitted by the petitioners. The caption of this estimate was as follows: "*Memorandum of amounts due Gibbons and Kelly for light-house structures, transportation, &c., in California and Oregon*;" and it contained, amongst others, the following items: (a) "Loss of materials assigned to government by wreck of barque Oriole, \$10,558." (b) "Paid eighteen hands for fifty days' time, board, passage back to San Francisco, occasioned by loss of barque Oriole, \$4,390."

On the 10th day of January, A. D. 1855, the Senate adopted the following resolution:

"*Resolved*, That the Secretary of the Treasury furnish the Senate with all the original papers, including the report of the Commissioner of Customs, in relation to the claim of Gibbons and Kelly, the contractors for building the light-houses in Oregon and California, for

the balance which they state is due them ; and that he also report to the Senate the amount he has paid said contractors out of the appropriation of \$59,434 made at the last session of Congress to pay said claim, and how much of said appropriation remains unexpended."

The petitioners claim that the United States are liable to them :

I. For the value of the goods lost in the Oriole ; and

II. For the consequential damages claimed by them in their estimate above mentioned.

The petition embraces other items ; but the argument which has been submitted related chiefly to these two. We deem it necessary now only to consider the former.

I. Are, then, the United States liable to the petitioners for the value of the goods lost in the Oriole ?

This question involves the necessity of determining the proper construction as well of the original contract as of the charter-party.

We will first consider the original contract. Appropriations had been made by acts of Congress, as we have seen, for the erection of several light-houses in California and Oregon, and the object of this contract was to carry those acts into execution. The petitioners undertook to construct the light-houses ; but the work to be done before the materials were actually put into the several structures was undertaken in part by the United States, and in part by the petitioners. It was deemed expedient that the necessary materials should be procured in the Atlantic States, transported thence to San Francisco, and there delivered to the collector of that port. The duty of procuring the materials and shipping them was undertaken by the petitioners. A payment in advance was to be made by the United States to the petitioners for the illuminating apparatus and other materials for the light-houses to be sent from Atlantic ports. The language of the contract upon this point is ; "that in consideration of the advances of money to be made by the parties of the first part for the illuminating apparatus and other materials for the said several light-houses to be sent from Atlantic ports, that," &c. This payment in advance was to be made as soon as the illuminating apparatus, lantern, fixtures, fog-signals, oil vessels, and tins should be shipped and insured, and the policy of insurance, accompanied by a duplicate of the bill of lading, assigned and delivered to the United States, and upon the execution and delivery of the penal bond required by the contract. After the delivery of the materials to the collector of the port of San Francisco, they were to remain in his possession until the petitioners should require them to be transported to the several places where they were to be used, when they were to be transported to those points under his authority in a revenue cutter of the United States, or other vessel. Such was the original contract, so far as it bears directly upon the point now under consideration.

The petitioners insist that, under the proper construction of this contract, upon the assignment of the policy of insurance and the bill of lading to the United States, they became the owners of the materials embraced by those instruments. In considering the legal effect and operation of the contract with reference to this point, it is proper to view it in connexion with the first section of the act of Congress,

of January 31, A. D. 1823, (3 Stat. at Large, 723,) which is as follows : "No advance of money shall be made in any case whatever; but in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment: *Provided*, That it shall be lawful, under the special direction of the President of the United States, to make such advances to the disbursing officers of the government as may be necessary to the faithful and prompt discharge of their respective duties, and to the fulfilment of the public engagements: *And provided, also*, That the President of the United States may direct such advances as he may deem necessary and proper to such persons in the military and naval service as may be employed on distant stations, where the discharge of the pay and emoluments to which they may be entitled cannot be regularly effected." This case, it is obvious, does not fall within either of the exceptions in the statute, because the petitioners were neither disbursing officers of the government nor persons employed in the military or naval service of the United States; but the general enactment has a direct application to it. The contract was doubtless made with reference to the statute, and hence we find that it particularly specifies *when* and *for what* the payment in advance was to be made.

The statute forbids *advances* of public money in *all cases*; but in cases of contracts for the performance of any service, or the delivery of articles of any description for the use of the United States, it allows *payment* to be made not exceeding the value of the service rendered, or of the articles delivered previously to such payment. An advance of money on contract, strictly speaking, is a payment made before an equivalent is received. It is such an advance that is forbidden by this statute. It distinguishes, it will be observed, between an advance and a payment. The payment which it contemplates is a payment for a full equivalent received, as contra-distinguished from a payment or an equivalent expected. The former it allows; the latter it forbids. It prescribes three requisites to constitute a valid payment: 1st, that it be a payment in the sense of the statute; 2d, that it be made in a case of contract for the performance of some service, or the delivery of articles of some description for the use of the United States; and, 3d, that it shall not exceed the value of the service rendered, or of the articles delivered previously to such payment.

In the construction of the contract now under consideration, we must presume, as already indicated, that the parties not only had this law in contemplation, but meant to conform to it. If, therefore, it be susceptible of two constructions—one consistent, and the other inconsistent with the statute—the former construction must be adopted. "It is a general rule," saith Lord Coke, "that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken."—1 Coke upon Litt., 620, (Thomas's Ed.) In *Shore vs. Wilson*, 9 Cl. and Fin., 397, Lord Lyndhurst said: "The rule is this, and it is a fair and proper rule, that where a construction, con-

sistent with lawful conduct and lawful intention, can be placed upon the words and acts of parties, you are to do so, and not unnecessarily to put upon these words and acts a construction directly at variance with what the law prohibits or enjoins." This doctrine is so manifestly in accordance with the dictates of justice and of common sense, that a further citation of authority in support of it cannot be necessary. But the fair and natural construction of the contract in this case—that which is suggested by the proper signification of the language employed—is entirely consistent with the requirements of the statute. (1.) The payment provided for in it is precisely the kind of payment contemplated by the statute. It was called a payment in the contract. In one part of the contract it is spoken of as "advances to be made;" but the direct stipulation to make it is, "will thereupon *pay* and advance." But what essentially characterizes it as a payment authorized by the statute is, that it was not to be made until after the equivalent was received by the United States. (2.) It was made for services rendered and articles delivered for the use of the United States; for it was not to be made until after the bill of lading and policy of insurance were assigned and delivered to the United States. The articles must be regarded as delivered *for the use of the United States*, because not only was an assignment of the bill of lading and of the policy of insurance the appropriate method, under the circumstances, of such delivery, and so to interpret the contract is alike consistent with its words and the provisions of the statute, but any other interpretation would render it violative of the statute. (3.) The services rendered and the articles delivered before the payment was made, may well be presumed to have been considered a fair equivalent for the amount of the payment.

It is, therefore, apparent that the contract in this case conformed to the three requisites of the statute already noticed. The assignment and delivery of the bill of lading and of the policy of insurance to the United States were equivalent to, and in effect were, a delivery to them of the articles which had been shipped, (*Newson vs. Thornton*, 6 East., R. 41;) and the delivery, as we have seen, was for the use of the United States. But a delivery of articles for a valuable consideration to the United States *for their use*, is the most expressive form in which the transfer of the property in such articles to them could be made. We are therefore of the opinion, that upon the assignment and delivery of the bill of lading and policy of insurance, and the receipt by the petitioners of the stipulated payment, the materials became the absolute property of the United States.

The covenant on the part of the United States to transport those materials from San Francisco to the several places where they were to be used when required by the petitioners, was express and unconditional. Ever since the leading case of *Paradine vs. Jane Aleyn*, R. 267, it has been the settled doctrine of the common law, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he

might have provided against it by his contract. It that case, which was an action of debt for rent, the defendant pleaded that a certain German prince, by name Prince Rupert, an alien born, an enemy to the king and kingdom, had invaded the realm with a hostile army, and with the same force had entered upon the defendant's possession, and him expelled and held out of possession, whereby he could not take the profits; upon demurrer, the plea was held bad.

A lessee of a house, who covenants generally to repair, is bound to rebuild it if it be burned by an accidental fire. *Bullock vs. Dommitt*, 6 T. R., 650. On a covenant to build a bridge in a substantial manner, and to keep it in repair for a certain time, the party is bound to rebuild the bridge, though it be broken down by an unusual and extraordinary flood. *Brecknock Co. vs. Pritchard*, 6 T. R., 750. In that case Lord Kenyon, C. J., said: "The principle stated by the counsel for the plaintiffs is the true one; if the defendants had chosen to except any loss of any kind, it should have been introduced into the contract by way of exception. It is sufficient to say here that the contract of the defendants extends to this case, that they have not fulfilled it, and therefore that they are answerable."

The same doctrine is held in *Atkinson vs. Ritchie*, 10 East. R., 530, *Barker vs. Hodgson*, 3 Mau. & Sel., 267, *Shubrick vs. Salmond*, 3 Burr. R., 1637, and in other cases. In the case of *Barker vs. Hodgson*, the charterer of a ship, who covenanted to send a cargo alongside, at a foreign port, was not excused from sending it alongside, though, in consequence of the prevalence of an infectious disorder at the port, all public intercourse was prohibited by the law at the port, and though he could not have communication without danger of contracting and communicating the disorder. In that case Lord Ellenborough, C. J., said: "Perhaps it is too much to say that the freighter was compellable to load his cargo; but if he was unable to do the thing, is he not answerable for it upon his covenant? Is not the freighter the adventurer who chalks out the voyage, and is to furnish at all events the subject-matter out of which freight is to accrue? The question here is, on which side the burden is to fall?"

The law of carriers has no application to this covenant. The United States were in no sense carriers for the petitioners, because, as we have seen, the materials to be carried were the property of the United States. The United States undertook to transport them to the places where they were to be used, and the petitioners on their part were required to send therewith, in the same vessel, a competent artisan and a sufficient number of workmen to place the apparatus and fixtures without unnecessary delay in the several towers erected for their reception. The materials were lost by shipwreck, and the United States were thereby prevented from the performance of their covenant. But the act which they undertook to do was possible when undertaken. If they "had chosen to except any loss of any kind, it should have been introduced into the contract by way of exception." We are of opinion that it falls within the doctrine of *Paradine vs. Jane*. But, as we have already intimated, we do not deem it necessary now to inquire what damages the petitioners are entitled to by reason of the breach of this covenant.

It remains now for us to consider the construction of the charter-party. As regards the voyages for which the charter-party provides, the relations of the parties, their rights, duties, and responsibilities, are to be determined by it. The petitioners, therefore, did not stand in the relation of common carriers to the United States, and the law of common carriers has no application to them. Either the petitioners are to be regarded as private carriers for hire, or the United States became, under the charter-party, owners of the Oriole *pro hac vice*.

If the petitioners were private carriers for hire, they were bound only for *ordinary* diligence, and responsible only for *ordinary* neglect. They were bound to such diligence as every prudent man commonly takes of his own goods, and, consequently, were not liable for any loss or injury to the goods intrusted to them, which was occasioned by *unavoidable* accident, or by such means that they could not have guarded against it by any ordinary diligence. The law, too, would imply an agreement on their part to make good any losses arising from the negligence of their own servants.—Brind *vs.* Dale, 8 Carr. & P., 207. It may also be remarked that the responsibility of a private carrier for hire may be increased by special contract; but even an express *warranty* that the goods shall go *safely* merely puts him into the situation of a *common carrier*. Per Chambre, J., in Robinson *vs.* Dunmore, 2 Bos. & Pull. R., 417. It is also considered that even an express promise by a private carrier to carry goods *safely* is but the undertaking implied by law to carry free from ordinary negligence. Story on Bailment, § 457, § 33; Augell on Carriers, § 60; Ross *vs.* Hill, 2 C. B., 877. The most that can be said in this case is, that the petitioners undertook to carry and deliver. There was no express warranty, and no contract to carry safely and securely. Under a contract to carry and deliver, the law only implies the promise to use ordinary diligence. If, therefore, the petitioners stood to the United States in the relation of private carriers for hire, and the wreck of the barque Oriole was not occasioned by unavoidable accident, but might have been guarded against by ordinary diligence, then they would be liable to the United States for the damages which they thereby sustained; but otherwise the United States would have no claim against them on that account.

We do not think it necessary at this time to consider whether the United States were, under the charter-party, owners of the barque Oriole *pro hac vice*, because, if they were, the extent of the liability of the petitioners to the United States would not, in that event, be greater than if the petitioners should be regarded as private carriers for hire. Other questions also arise in this case, but we think it would be premature now to decide them.

We cannot say that the facts set forth in the petition of the claimants do not furnish any ground for relief.

Let an order be made authorizing the taking of testimony in this case.

DEPOSITIONS OF WITNESSES IN THE CLAIM OF GIBBONS & KELLY VS. UNITED STATES.

Deposition of Enoch Moore.

The deposition of Enoch Moore, taken at the request of Gibbons and Kelly, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Gibbons & Kelly. The adverse party was notified, did attend, and did not object.

1st Interrogatory. What is your name?

Answer. Enoch Moore.

2d Int. What is your occupation?

Answer. Master mariner.

3d Int. What is your age?

Answer. Fifty-one years.

4th Int. Where has your place of business been during the past year?

Answer. Witness has resided at Bridgton, West New Jersey.

5th Int. Have you any interest, either direct or indirect, in the claim which is the subject of inquiry—that is, of Gibbons & Kelly against the United States?

Answer. Witness has no interest, either direct or indirect, in said claim.

6th Int. Are you related in any degree with the claimants?

Answer. Witness is not related in any degree with the claimants.

7th Int. State what experience you have as a sea captain; your means of knowledge of the usual rates of transportation paid from San Francisco to different points on the Pacific coast from September, 1853, to September, 1854.

Answer. Witness has been master of a sea-going vessel for over twenty years, and during this time has been either part or whole owner of the vessels he has commanded. Witness owned the part of two vessels in San Francisco during that time, and always interested himself to know what was the rate in freight up and down the coast. The vessels of which witness was part owner were employed in carrying freight up and down the coast within that time. Witness sold one of the vessels before the close of the year; the other he still owns.

8th Int. What would you estimate the cost of sea-transportation, at the usual rates of freight between September, 1853, and September, 1854, of materials for the construction of a light-house at Cape Disappointment, the said materials to be taken on board at San Francisco and landed at Cape Disappointment, the vessel to be chartered for that particular voyage? And in answering this question, state what would be the additional cost, if any, of transportation by sea and returning to San Francisco, without delay, at same time, a sufficient force of laborers to transport the said materials from the place of landing to the site of the light-house?

Answer. Witness does not think that a vessel could be got to go up there with those materials, at that time, for less than six thousand

dollars. Witness means, to transport and land such materials on the beach.

The passage each way was fifty dollars in sailing vessels, and seventy-five dollars in steamers. Witness supposes that from fifteen to twenty men would be an economical force for the transportation of such materials from the beach to the site, but of the number employed he does not know. Witness knows that eighteen men were employed by Gibbons & Kelly, they being the land force on board of the vessel to go up there. This number is exclusive of the crew of the vessel. Including the crew and land force, there were thirty-two persons, "all told," on board of the vessel.

9th Int. You say six thousand dollars would be a reasonable charge for transportation by sea to the beach, from San Francisco, all the materials for said light-house. What would be a reasonable charge for said transportation of all said materials except the illuminating apparatus, bricks, lime, and rough stones?

Answer. In a vessel chartered for that voyage, it would make very little difference whether she was in whole or in part loaded; the only difference would be in discharging or in loading the vessel. Nearly all the principal items of expense would have to be incurred whether she was loaded or not, the loading and discharging being the only difference.

The best estimate witness can make of the difference of expense in transporting the lime, bricks, and illuminating apparatus, would be about four hundred dollars. If witness had chartered his own vessel to convey the materials for a light-house, he would not make a larger deduction. Witness would not have chartered his own vessel, with or without the above articles, for less than six thousand dollars. Any vessel suitable to make that voyage could have made, at that time, six thousand dollars by it.

Witness means that the difference he would make of four hundred dollars, would only be for loading and unloading such articles—that is, the lime, bricks, or rough stones, and illuminating apparatus.

10th Int. What would be a reasonable charge for transportation by sea all the materials for the light-house, excepting the illuminating apparatus, lime, bricks, and rough stones, to the beach at the site of the light-house at Humboldt bay?

Answer. Witness should think it would be worth four thousand four hundred dollars to make such a voyage, and this estimate he makes from his knowledge of the rates which were paid for other chartered vessels.

11th Int. What would be a reasonable charge for transportation by sea, all the materials for the light-house, excepting the illuminating apparatus, lime, bricks, and rough stones, to the beach at the site of the light-house at Point Loma?

Answer. The distance from San Francisco to Point Loma being about the same as from San Francisco to Oregon, witness considers it would be worth as much to make that voyage as the one to Cape Disappointment, with the like deduction.

12th Int. What would be a reasonable charge for transporting by sea all the materials for the light-house, excepting the illuminating

apparatus, lime, bricks, and rough stones, to the beach at the site of the light-house at Point Conception?

Answer. Witness is not as familiar with Point Conception as he is with the other points; but from a description of the place, and its appearance on the chart, witness should want a little more for a voyage there, than for the one to Humboldt bay; and witness does not think that five thousand (\$5,000) dollars would be out of the way, and thinks that masters of vessels would ask that sum. There is more risk and difficulty in getting the cargo on the beach; oftentimes vessels cannot lie there on account of the surf.

13th Int. What would be the average time of the voyage from San Francisco to these several points, Cape Disappointment, Humboldt bay, Point Loma, and Point Conception, and back again to San Francisco on each voyage, and computing sailing time only?

Answer. Witness should think the average time for a voyage to and from San Francisco to and from Cape Disappointment, not less than forty days. To and from San Francisco to Humboldt bay, from twenty-eight to thirty days. To and from Point Loma from San Francisco, fifty days would be a low estimate, vessels always being obliged to beat either one way or the other the whole distance, on account of the prevailing winds and the seasons.

During the summer it blows down, and in the winter up the coast.

It would take from thirty-three to thirty-five days to make the voyage to and from Point Conception from San Francisco.

14th Int. State what you know about the loss of the barque Oriole and the cargo with which she was freighted, and if you were on board at the time; if yea, in what capacity, and how said shipwreck occurred?

Answer. Witness was on board of the barque Oriole, and in charge of the government property, the light-house materials, as an inspector of customs, having been detailed at San Francisco by the collector of that port for special duty on board of the barque Oriole. The Oriole arrived "all right" off the Columbia river bar, and being off-and-on for seven days, she took on board a branch pilot, having waited for one during the seven days she lay off the mouth of the Columbia river. The pilot immediately took charge of the Oriole on his coming on deck, and remained on board until the next day, when he made an attempt to enter the river; in so doing, the vessel struck on the outer bar in eleven feet water, she drawing twelve feet, and within a very few minutes, witness thinks ten minutes, she had sunk to her topsail yards, all hands barely escaping with their lives, in the boats, in which they remained all night and until the next day, when all in the boats were picked up by a pilot-boat, belonging in the river, completely destitute, not being able to save a single article from the wreck, except one small valise. As far as witness is concerned, he only saved a pair of pants and one shirt, both of which were on his person.

Witness believing that the vessel or her cargo might be washed ashore on the beach below the mouth of the river, he went there and remained a week in order to save such articles as might be washed on shore there; but nothing ever came ashore except some broken spars and a piece of the broadsides of the vessel, and during this week

nothing else was washed up there. Witness went to that point because he was a government agent, and conceived it his duty to do so, in order to save any government property that might be washed there.

The reason of the vessel sinking up to her topsail yards, was, because of the ebb tide carrying her off the bank, it being steep, into deep water. The pilot on board was reputed to be one of the oldest and most experienced on the bar, and it was said that he was president of the board of pilots. He had a branch from the government, and had been a pilot for a long time. From what witness believes to be the cause of the wreck, the pilot missed the "slew" or channel, by probably a few feet, the tide having set the vessel too much to the south, and the wind not being sufficient to resist the force of the tide.

15th Int. State what you know about the number of hands, laborers and artisans, in the employ of Gibbons & Kelly, on board of the barque Oriole when shipwrecked.

Answer. Witness states there were eighteen men, exclusive of the officers and crew of the barque Oriole, in the employ of Gibbons & Kelly when the said barque was shipwrecked.

16th Int. Was the charter-party of the Oriole (now shown to, and read by the witness,) in your judgment an economical one, or could the United States have saved money by doing the transportation by other arrangement?

Answer. From what witness knows of the transportation of the government goods, he firmly believes that the charter-party of the Oriole was less by two-thirds than the government could have had it done by any other party. During the erection of the Farallones light he was on board and ashore the whole time. As witness always has understood this charter-party, and as he does now, upon reading it again, understand it to include all transportation of the materials, which the government was to transport on sea and on land to the site of the light-houses, witness does now repeat, that the government could not have had the same service performed by any other arrangement without paying at least two-thirds as much more.

17th Int. In making the estimates of the expense of transportations of the materials of said light-houses from San Francisco to the beach, do you include the expenses of loading and unloading the vessel, or merely the charges of transportation on the vessel itself?

Answer. In making his estimate the witness includes all the expenses to the beach.

18th Int. Was it or not to the advantage of the government that a vessel sufficient for transporting the materials for all said light-houses should be kept constantly engaged for this service rather than to get a vessel or vessels for each separate transportation as required? If yea, state the grounds of your opinion.

Answer. Witness thinks it was to the advantage of the government to keep one vessel engaged for the whole service. The reasons for this are, that at some seasons of the year no vessel could be obtained to go to some of these points, and there are times when, if vessels were scarce, the most exorbitant prices would be demanded of the government. One of the expenses saved by the government in keeping

one vessel employed, was that of warehousing, which was enormously high. Witness knew of an old hulk, dismantled and unseaworthy, to realize six thousand dollars per month, at this time, as a store-ship.

19th Int. Was the said land transportation of the materials of the said light-houses to their sites a heavy undertaking, and was it an unusual one for the owners of a vessel to make?

Answer. No ship-master or ship-owner could be obtained to do this land transportation. Witness would not have undertaken this service at any price, it being entirely out of the line of business of ship transportation. Conveyances would have to be procured for the transportation of the materials; if there were no roads, they would have to be made; and, as in the case of the Farallones light-house, the materials had to be carried on the backs of men, it being too steep for teams and animals, and at length jackstays had to be erected in order to hoist the materials to the top of the peak where the light-house was erected.

20th Int. Are you acquainted with William J. Timanus, foreman of Gibbons & Kelly? If yea, what were his services worth, per diem, in California and Oregon in the month of October, 1854.

Answer. Witness is acquainted with William J. Timanus, and thinks his services at that time and in that country were worth at least fifteen dollars per day, as compared with what was paid to other persons in a similar capacity.

The examination-in-chief of Enoch Moore was here concluded, whereupon H. — J. Anderson, esq., who appeared for and represented the United States, proceeded to examine the said witness upon cross interrogatories.

1st Cross Int. What do you mean by the words used by you, materials for the light-houses erected in California and Oregon?

Answer. There was a long inventory of the articles belonging to the government in the possession of the witness, which was lost in the wreck.

Witness's estimate of six thousand dollars was for the transportation of all the materials for the erection of a light-house.

2d Cross Int. What would it cost to transport that part of such materials called "the wood-work, exclusive of the joists and rafters," for the light-house at Cape Disappointment, from San Francisco to Cape Disappointment?

Answer. It would cost six thousand dollars. Witness might be induced to make an abatement on account of the saving of labor in loading and in unloading.

3d Cross Int. What would be the size of the vessel required to transport such materials?

Answer. The materials might have been placed in a smaller vessel than witness would like to have gone in, the navigation being very dangerous. Vessels of a small class have attempted it, but were obliged to return. Witness thinks a vessel of a less capacity than two hundred tons would not be suitable for such a service.

4th Cross Int. Do these estimates include the expense of loading and unloading, lighterage, pilotage, and passage of men?

Answer. In making his estimates, witness includes the expenses of

loading and unloading at the several points, lighterage and pilotage. Witness would have charged passage for the men.

5th Cross Int. Would the passage of the men at one hundred dollars each, out and back, be an additional charge?

Answer. Besides the six thousand dollars, witness would have charged for the passage of each man, out and back, one hundred dollars, it being the ordinary rate for a passage—making in all seven thousand eight hundred dollars for a voyage. In charging this amount for a passage, witness would be making very little. Witness would have considered it his duty to have delivered the materials beyond the reach of tide.

6th Cross Int. What quantity of lumber, exclusive of joists and rafters, would it take to construct the wood-work of the light-house at Cape Disappointment?

Answer. Witness does not know what quantity of lumber, exclusive of joists and rafters, it would take to construct the wood-work of the light-house at Cape Disappointment.

7th Cross Int. Would these answers in relation to Cape Disappointment light-house apply equally to the light-houses at Humboldt bay, Point Loma, and Point Conception?

Answer. The answer of witness as to the quantity of lumber, exclusive of joists and rafters, it would take to construct the wood-work of the light-house at Cape Disappointment, will apply equally to Humboldt bay, Point Loma, and Point Conception. And the same answer will apply generally to the cost of transportation, pilotage, and to other items.

No further cross-interrogatory being propounded to the witness, and his testimony being concluded, he was asked "to state whether he knew of any other matter relative to the claim in question; and if he did, he was asked to state it.

Answer. Witness knows of nothing but what has been stated, except that it was a disastrous concern to the contractors, Gibbons & Kelly, and to himself. Witness thinks he ought to know something about these matters, as he resided in California from February, 1850, till April, 1854, discharging various duties during that time.

ENOCH MOORE.

Taken by, and signed before me, in the city of Baltimore, on the thirty-first day of January, anno Domini 1856.

BOLIVAR D. DANELS, *Com'r.*

Deposition of William J. Timanus.

The deposition of William J. Timanus, taken at the request of Gibbons & Kelly, on the 19th of January, anno Domini 1856, to be used in the investigation of the claim against the United States, now pending in the Court of Claims in the name of Gibbons & Kelly. The adverse party was notified, did attend, and did not object.

1st Interrogatory. What is your name?

Answer. William J. Timanus.

2d Int. What is your occupation?

Answer. Contractor and builder of masonry.

3d Int. What is your age?

Answer. Forty-six years.

4th Int. Where has your residence been during the past year?

Answer. Witness has resided during the past year at Ellicott's Mills, Howard county, in the State of Maryland.

5th Int. Have you any interest, either direct or indirect, in the claim of Gibbons & Kelly, which is the subject of inquiry?

Answer. Witness has no interest, either direct or indirect, in said claim.

6th Int. Are you related in any degree with either of said claimants?

Answer. Witness is related to neither of them.

7th Int. Have you held any employment under Gibbons & Kelly, touching the execution of any contract between them and the United States, for the erection of light-houses in California and Oregon; and if so, what was your position and what were your duties? State them fully.

Answer. Witness was employed by Gibbons & Kelly in carrying out their contract. His position was that of superintendent, to see to the execution of their contract for the building of light-houses in California and Oregon. His duty was to employ hands, to keep accounts, to make disbursements, and to purchase materials. All of which duties witness discharged.

8th Int. Did you visit personally the different posts for the erection of light-houses, as designated in this contract, or where in fact were the light-houses built?

Answer. Witness personally superintended the building of the light-houses on their different sites, as designated in the contract, and upon which they were built, except the one at Humboldt bay.

9th Int. State when you arrived in California, and where you commenced your operations, and the circumstances attending the execution of those duties at Alcatras and Battery Point.

Answer. Witness arrived in California on the seventeenth day of December, in the year one thousand eight hundred and fifty-two, and commenced his labors on Alcatras island, and the second light-house was built on Battery Point.

10th Int. Who did the transportation of the goods, and from what place were they transported to the several points? What were the dangers and difficulties attending these transportations, and who paid the expenses thereof? Whether there was any provision made by the government for these transportations? Please answer fully.

Answer. Mr. Kelly and Mr. Gibbons did all the transportation of the materials to Alcatras and Battery Point from San Francisco. Besides the dangers of the sea, there was great difficulty and danger in obtaining a landing at Alcatras island on account of the strong currents. The land-delivery was very difficult, because of the high point on which the light-house was built, the materials having all to be carried by men, as no animals could be used. Gibbons & Kelly paid through witness all expenses for these transportations, there

being no arrangement made by the government for the payment of the same.

11th Int. Whether the expenses of subsistence and wages were at that time high in California?

Answer. Flour was at that time selling at from forty to fifty dollars per barrel; beef ranged from 12½ to 25 cents per pound, and this was the cheapest article of food. All wages were high; mason's wages were eight dollars per day; bricklayer's wages varied from eight to twelve dollars; laborers from four to six dollars; other expenses were in proportion.

(A copy of a charter-party, found on page 20 of Executive Document No. 53, of 33d Congress, being shown to witness, he was asked—)

12th Int. Whether he executed the same on the part of Gibbons & Kelly, and to state the facts and circumstances attending the same.

Answer. Witness states that he executed the same on the part of Gibbons & Kelly.

13th Int. Whether, after the execution of this charter-party, any transportation was done by Gibbons & Kelly, and from and to what point?

Answer. Witness states that there was little transportation done by Gibbons & Kelly to Alcatraz island and Battery Point, from San Francisco, after the charter-party was executed. The light-houses of these points were nearly completed when the vessel (the Oriole) arrived at San Francisco. The whole of this transportation to Battery Point and Alcatraz, after the arrival of the Oriole, did not amount to more than four or five hundred dollars. Witness did not consider this transportation in lighters as included in the charter-party, because the Oriole was then discharging a portion of her cargo to the collector of the port of San Francisco.

14th Int. When did you begin the transportation under the charter-party, to what point was it made, and how long did it continue?

Answer. The vessel sailed from San Francisco on or about the twenty-sixth day of February, in the year eighteen hundred and fifty-three, and was engaged in the transportation for the light-houses at Monterey and Farallones island, and carried all the men and materials to these points until they were finished, when they returned to San Francisco in the Oriole, and took on board again some of the materials previously delivered to the collector of the port, when they proceeded with the materials and men to build the light-house at Cape Disappointment, at the mouth of the Columbia river. After obtaining our outfit, we sailed from San Francisco about the twenty-sixth or twenty-seventh day of August, in the year eighteen hundred and fifty-three, and arrived off the mouth of the Columbia river some six or seven days before we obtained a pilot. We laid off and on, not venturing to enter without a pilot. The one whom we obtained was represented as a regular pilot, and witness understood, after the wreck, at Astoria, that this pilot was the captain of the board of pilots, and reputed to be a first-rate one.

The pilot being on board, we proceeded in company with five other vessels, they being ahead; when we arrived near the bar he (the pilot)

said he was going to take the vessel in through the middle channel ; the pilot also told witness that he was fearful that they would get on the bar too late ; the five vessels went over safely. This vessel (the Oriole) was said to draw more water than either of the other five vessels, and when she got on the bar he (the pilot) said the vessel had met the ebb-tide, and he said there was not sufficient wind to stem the said tide; the current drove her in shallow water, when she struck and then drifted among the breakers. After striking the third time, the pilot declared the vessel lost. All hands on board then provided themselves with the means of escape, the vessel then filling with water. Witness escaped in a surf-boat. All hands were saved, but everything on board was lost, with the exception of a small trunk containing two thousand dollars, the same being thrown in the boat in which witness was, but by whom thrown the witness cannot say. They were exposed in the open boats for seventeen hours, without either food or water, having no time before leaving the vessel to provide either. From the time the pilot came on board he had the whole command of the vessel.

15th Int. Who had charge of the materials for the several light-houses which were to be built, and which were on board of the Oriole ; and if any such agent, by whom was he appointed, and did he have the custody and possession thereof?

Answer. Captain Enoch Moore was on board, and witness thinks Captain Moore showed him his authority ; but witness recollects that Mr. Hammond, the collector at San Francisco, told him that he (Moore) was appointed to take charge of the materials on board the Oriole, and in point of fact Moore had and did exercise control over them.

16th Int. Whether, after the wreck of the Oriole, you notified the collector at San Francisco that you were ready to go on with the light-houses which remained to be built, and request him for the materials for the same, and the means of transportation, and what he said?

Answer. That witness did go to San Francisco, and did inform the said collector that he was ready to proceed with the light-houses. That after his return, witness told the collector of the loss of the Oriole and of all the materials, and asked for other materials to be furnished, and transportation of the same, that he might go on with the light-houses and execute the contract. Mr. Hammond, the collector of San Francisco, and witness differed as to his (Mr. Hammond's) duty to furnish the materials, as he doubted his right to furnish them. The collector did not furnish any, nor the means of transportation ; he told witness to go on and do the transportation ; that either he or the government would pay for the same. The collector did not furnish any material or transportation, nor the money for either. Witness furnished the materials and transportation for building the light-houses at Cape Disappointment, Humboldt bay, Point Conception, and Point Loma ; witness, as agent for Gibbons & Kelly, furnished the same.

17th Int. State whether or not you went on and finished the light-houses mentioned in the last question.

Answer. That witness did proceed with and finish the light-houses mentioned in the last question.

18th Int. When you finished the said light-houses, was there any agent of the government there to inspect and receive the same, or either of them?

Answer. To the knowledge of the witness there was none to inspect or receive the same, or either of them; Captain Halleck, who had been employed as an agent on the part of the government, and who had inspected and accepted the other light-houses built by witness, as superintendent of Gibbons & Kelly, having left the Pacific coast and gone to the Atlantic States. Witness could find no one authorized to inspect and accept the same.

19th Int. Was any one notified of the completion of the light-houses, or of the period when they would be, in order to obtain an inspection and an acceptance of the same by the government, when they would be finished?

Answer. Prior to Captain Halleck leaving the country, (the Pacific coast,) he (witness) was in the habit of notifying him of the progress in, and completion of, each light-house, so that he might be ready to inspect them when finished.

After Captain Halleck left the Pacific coast, he (witness) notified Mr. Hammond, the collector of San Francisco, in the same way, with the same object.

20th Int. How long were you and your workmen detained after these light-houses were finished and ready to be delivered to the government, before they were so inspected and accepted?

Answer. That witness and Francis X. Kelly, one of the contractors, were detained in California from the fifteenth of July, in the year eighteen hundred and fifty four, until the first day of October of the same year, in consequence of there being no person to receive or accept the same.

21st Int. Whether in consequence of the failure of the government to deliver the materials at Cape Disappointment, the contractors were subjected to extraordinary expenses on that account? If so, state the nature of such expenses, and the amount.

Answer. The actual expenses which witness was obliged to pay to the workmen employed by him at San Francisco, for the building of this light-house, were for hire, subsistence, and expenses of travel; that witness has not vouchers of the payments made by him on these several accounts; from the circumstances surrounding him after his shipwreck, he could not keep a regular account upon vouchers. That he, witness, contracted with these workmen, and the only way they would contract with him for wages, subsistence, and all expenses of travel, was from the time he engaged them at San Francisco, and until they returned to the same place. That they, the workmen, claimed this fulfilment of this contract, and was obliged to pay and did pay on this account the sum of five thousand eight hundred and eleven dollars and fifty-four cents of the money belonging to the funds of Gibbons & Kelly. That witness is positive that he paid this amount, as he kept memoranda of the amounts paid by him at the time. Witness cannot be mistaken on this point.

22d *Int.* Looking at all the circumstances, from your knowledge of the rate of transportation at that time in that country, what would you consider a fair and reasonable consideration for the transportation of the government materials for building the light-houses at Alcatraz and Battery Points?

Answer. Including land and sea transportation, and making a place of landing, and making the roads conveying the materials up the steep ascent, which were indispensable to such transportation, witness thinks that a fair compensation would be between six and seven thousand dollars for the two light-houses.

23d *Int.* From your personal knowledge of the materials on board of the Oriole, belonging to the government and destined for the building of the four light-houses at the time she was wrecked and which were lost, what estimate do you make of the value of the same?

Answer. Witness was requested shortly after the wreck of the vessel to make such an estimate, which he did. The manner in which witness made this estimate, he will now state: Witness, of his own personal knowledge, did not know of what amount of materials was on board of the vessel as originally shipped from Baltimore. He had frequently looked at the manifest and bill of lading, which were in the possession of the captain and the collector of San Francisco, which described the kind of materials and the amount and value of them.

Prior to the vessel's leaving San Francisco, on her last voyage, the materials of the four light-houses had been delivered from the cargo and the houses finished; there remained on the vessel the materials of four other light-houses, except some lumber, tin cans, hair, lathes, &c., which had been delivered to the collector of San Francisco. Witness cannot exactly estimate the value of the goods left with the collector, as he has no means of ascertaining it. As well as he is able to estimate the value of the materials of the government on board of the vessel at the time of the wreck, witness thinks they were about the value of one-half the original cargo—not quite one-half, but in that neighborhood. According to the best estimate he can make, from all the source of his information, witness believes that the value of the government property lost in the Oriole to be ten thousand five hundred and fifty-eight dollars.

24th *Int.* What length of time was occupied in transporting the materials and in erecting the four light-houses after the loss of the Oriole?

Answer. From the time of the wreck of the Oriole to the completion of the last light-house, a little over ten months elapsed, during all of which time there was a necessity for the means of transportation by both land and water.

25th *Int.* What do you consider a reasonable compensation for yours and Mr. Kelly's attention in California by reason of the failure of the government to provide an officer to accept and inspect the light-houses when the same were finished?

Answer. Witness considers fifteen dollars per day a fair compensation for his services, as also for Mr. Kelly's. Gibbons & Kelly were paying witness between ten and fifteen dollars per diem, by the year, all the time he was in their service, including his expenses.

26th Int. When was the last light-house finished, inspected, and accepted by the government?

Answer. It was accepted some time in September, but on what day witness does not remember, but it was finished too late for witness and Mr. Kelly to leave the country in the steamer before the first of October.

WM. J. TIMANUS.

The further taking of William Timanus' testimony was herèupon adjourned, by consent of parties. The commission thereupon adjourned until the thirty-first day of January, 1856.

WILLIAM J. TIMANUS resumed on the 2d February, anno Domini 1856.

27th Int. Whether or not, according to your knowledge, the sum stipulated to be paid in the charter-party for transportation and other services was reasonable, and whether or not it was to the advantage of the government so to contract, rather than to obtain transportation, &c., by the job for each light-house separately?

Answer. Witness states that at that time he knew but little about the worth of vessels there, and had to depend very much upon the estimate and opinion of sea-faring men. When witness waited on Mr. Sanders, the then collector of the port of San Francisco, for the purpose of knowing what he was going to do with those goods which were on board of the barque Oriole, and which were consigned to the collector of that port, witness told the collector that it was necessary to have them (the goods) discharged from the vessel, and to have them transported to the places where they were to be used. The collector, Mr. Sanders, told witness that he really did not know what to do with them, that he had no place to store them, and that the government had no vessel there to transport them. Witness then proposed to him the chartering of the Oriole. Then for the first time arose the question under the contract, witness claiming both sea and land transportation. Mr. Sanders, the collector, then said that he would have to examine that contract, and witness thinks that he also stated that he (Sanders) would have to take legal advice upon the subject, and witness also thinks that he furnished Mr. Sanders with a copy of the contract. Witness does not recollect whether, after his examining the contract, Mr. Sanders told him of any conclusion to which he had arrived, but Mr. Sanders asked witness to make an estimate of what he would ask for the chartering of the barque, which witness agreed to do. A few days after witness made up an estimate.

The knowledge of witness as to the proper estimate for the transportation was derived from sea captains, and the estimate for the land transportation was made by witness from the knowledge which he also derived from information which he had received from others, as also from the charts which were in his possession.

The amount of witness's estimate, as arrived at in that way, was either three thousand and five hundred or three thousand and six hundred dollars per month. Mr. Sanders then requested witness to leave that estimate with him, in order to make some inquiry as to its

correctness. The land transportation, as also the transportation of workmen by sea, were included in that estimate.

In one or two days witness again waited on Mr. Sanders to know what he was going to do in regard to the estimate, when Mr. Sanders asked him whether he could not do it for less than that amount. Witness told him that he did not know; that he was anxious to be doing something, as he was under a heavy expense, having all the hands under pay. Mr. Sanders then offered three thousand dollars per month, which offer witness concluded to accept. Witness thinks that the charter-party was an economical arrangement on the part of the government. The reasons for witness thinking it an economical arrangement on the part of the government, were, that it would have been almost impossible to obtain a vessel to do both the sea and land transportation. The points of the different light-houses were so difficult of access by land that the owners or masters of ships, the land transportation being so much out of their line, would have nothing to do with it.

28th Int. State whether or not, as superintendent for the petitioners, you remained in California after the completion of the light-house last erected under their contract, and until the same was finally inspected and approved by the proper authorized agent of the United States; and if yea, please state what you would have done as such superintendent in case the said agent had required further work and materials to be furnished upon said light-house before approving and accepting the same under contract.

Answer. Witness, as superintendent for the petitioners, did remain in California after the completion of the last light-house erected under the contract, and until the same was finally inspected and accepted by the proper authority. The contractors could get nothing until the work was approved. And if the demand for further work upon the light-house had been reasonable, witness would have complied with the same; but if it had exceeded the amount already expended on them, witness thinks he would have refused and thrown up the contract, because it would have ruined the contractors.

29th Int. State whether or not, to your personal knowledge, it would have been practicable to have engaged artisans and workmen at and during the times said light-houses were built, to assist in the erection of the same for the same wages actually paid to them, without undertaking to furnish them with free transportation to and from the sites of said light-houses; and whether the said charter-party was or not intended, among other things, to furnish such free transportation to said artisans and laborers, and state particularly whether or not there were such facilities of travelling and transportation at that time in California as would have enabled said artisans and laborers to have returned to San Francisco after erecting said light-houses?

Answer. It would have been impossible to have employed workmen without furnishing them with transportation from and to San Francisco free of expense to themselves. Witness tried to employ men without this stipulation, but could not, and he had to pay them wages from the time he employed them at San Francisco until their return to that city. The said charter-party was intended to give such free

transportation to workmen and artisans. There was no communication between the several points of the said light-houses and San Francisco. There were vessels passing to and fro, but none stopping at any or either of said points. The only way in which the artisans and laborers could have been carried to San Francisco, would have been for them to have gone to those points at which those vessels, passing the points at which the light-houses were built, stopped. Even then there was great uncertainty as to what time they could get away.

30th Int. Assuming that the government of the United States, immediately after the loss of the Oriole, had the materials of the four light-houses then to be erected, and was bound to deliver the same at the several points where they were to be used, to which the artisans and laborers were to be transported, and to which several places they were to be transported under the authority of the collector of the port of San Francisco, when required by the petitioners or contractors in a vessel, please state whether or not, in the case above supposed, it would have cost the government at the rate of three thousand dollars a month, as provided in the charter-party, for such transportation and delivery of the materials for said four light-houses at the said several points.

Answer. Witness believes that if the government had undertaken to deliver these goods, and the artisans and laborers, as embodied in the charter of the Oriole, within the time that Gibbons & Kelly did it, it would have cost the government more than three thousand dollars per month.

31st Int. State which of the light-houses were constructed after the wreck of the Oriole, and name them, stating the distance from San Francisco to each of them as nearly as you can, and also state what you know about the facilities of land transportation, if any, from San Francisco to each of said light-houses, compared with the facilities of transportation by water?

Answer. There were four constructed after the loss of the Oriole, viz: the one at Cape Disappointment, Point Conception, Point Loma, and Humboldt bay.

The distance from Cape Disappointment to San Francisco, witness thinks was about seven hundred miles. The distance from Point Conception to the same point about three hundred and fifty miles. The distance from Point Loma to the same point about six hundred miles, and the distance from Humboldt bay to the same point about two hundred and fifty miles.

Witness believes that there was no possible means to transport these materials to the different points by land, and therefore no comparison can be made.

32d Int. State the distance by land to the sites of each said light-houses from the most convenient place of landing materials intended for and used in the construction of light-houses erected after the wreck of the Oriole?

Answer. The distance by land to the sites of the light-house at Cape Disappointment from the landing place was from one-fourth to one-half of a mile; the distance to the site of the light-house at Point Con-

ception from the point of landing was one mile and a half; the distance to the site of the light-house at Point Loma from the point of landing was about four miles; and as to Humboldt bay, witness cannot state.

The distances by the road would be more, as a straight road could not be made.

WILLIAM J. TIMANUS.

The further taking of William J. Timanus' testimony, by consent of parties, was hereupon adjourned until the sixth day of February, A. D. 1856.

WILLIAM J. TIMANUS, witness for the petitioners, resumed on the sixth day of February, 1856.

33d Int. State from your knowledge of the character of the land transportation from the places of landing to the sites of said four last light-houses, what you would consider a fair and reasonable compensation to be paid to the contractors, Gibbons & Kelly, for such land transportation; and in answering this question, separately estimate the land transportation from the places of landing of the materials used in the construction of each of said four light-houses, erected after the wreck of the Oriole, and give the grounds and reasons for such estimate in each case, as nearly as you can.

Answer. Witness had formerly made an estimate, some time in January, eighteen hundred and fifty-four, and according to that estimate, and to which witness swore, on his return to Baltimore, the land transportation to the light-house at Cape Disappointment would amount to between fifteen hundred and two thousand dollars; the land transportation, according to said estimate, at Point Conception, would be from fifteen to eighteen hundred dollars; the land transportation, according to said estimate, at Point Loma, would, according to witness's judgment, amount to between twenty-five hundred and three thousand dollars; the land transportation, according to said estimate, at Humboldt bay, would amount to between fourteen hundred and fifteen hundred dollars. It is impossible for witness to arrive at a proper conclusion, as his estimates are based upon conjecture.

Witness will now state the circumstances under which he made the estimate of the transportation of those four light-houses. It was made after the wreck of the Oriole, and after his return to San Francisco, which was in October, eighteen hundred and fifty-three. The estimate was made about the middle of January, eighteen hundred and fifty-four, after frequent interviews with Mr. Hammond, the collector, to induce him to furnish the materials lost by the government in the wreck of the Oriole, and to transport the same to the sites where they were to be used. Neither of which he (witness) could get him to do, Mr. Hammond doubting his right to furnish the lost materials, and he told witness to go on and transport the materials himself, and that he (Hammond) or the government would pay for the same. At the same time, Mr. Hammond insisted on witness's making an estimate of what the transportation of the same to each site was worth; which witness objected to do, from the fact that he had never seen any of

the points except one. Witness asked Mr. Hammond to make an estimate of what it was worth, as he (Hammond) was better acquainted with the country than he (witness) was, but Mr. Hammond said that he could not do it, and insisted on witness's making it. Witness then made the estimate in the hopes of arriving at some conclusion, so that he might be able to proceed to the completion of the contract, for he very much doubted whether the amount of money coming on those houses would enable him to complete the same, and to furnish the materials, and to transport the same to the sites, for witness had but a small amount of money on hand at that time, and could only draw more as each house was completed and accepted by the government agent.

Witness would not have been willing to contract with Mr. Hammond at any less amounts than his estimate, for from all he could learn, and from his (witness's) own opinion of the value of it, he believed the amounts to be reasonable and just, and witness has not since known anything to cause him to change his opinion.

34th Int. State whether the specific sum indicated by the contract, to be deducted from the advance payments, was deducted by the collector for the four light-houses, viz: the one at Cape Disappointment, Point Conception, Point Loma, and at Humboldt bay? and if so, please state the amounts so deducted?

Answer. Witness says that an amount was deducted from the said four light-houses, viz: the sum of three thousand eight hundred and sixty dollars was deducted from each light-house in California, viz: the one at Humboldt bay, the one at Point Loma, and the one at Point Conception; and the sum of seven thousand nine hundred and eighty dollars for the one at Cape Disappointment.

35th Int. What amount of expenses did Gibbons & Kelly incur by the detention in California, after the light-houses were finished, awaiting the inspection of the same by a government agent?

Answer. The value of the time at fifteen dollars per day, amounting to twenty-two hundred and fifty dollars, for witness and Mr. Kelly, and the travelling expenses incurred from the same cause, at five hundred dollars.

WILLIAM J. TIMANUS.

The petitioners here closed their examination of William J. Timanus, and the United States thereupon proceeded to examine the said witness upon cross-interrogatories. The said examination being conducted by H. J. Anderson, Esq., who appeared for and represented the United States.

1st Cross Int. In your statement made to the commissioner of customs, on the twentieth day of December, eighteen hundred and fifty-four, you estimate the value of the materials assigned to the government, and lost on board the Oriole, at ten thousand five hundred and fifty-eight dollars, and you also state that the original amount of the invoice assigned to the government was over twenty-three thousand dollars, and that not quite half the materials had been taken from the barque.

You now state that some portion of the materials for the four light-houses had been delivered at San Francisco.

Will you please state how much of said materials had been delivered, and what was their value?

Answer. Witness does not know the amount or the value of them, but would suppose them to be worth between one and two thousand dollars.

2d Cross Int. In said statement of December twentieth, you estimate the manufactured wood-work and the rough lumber for the four light-houses at two thousand six hundred and ninety-one dollars. What is your estimate of the quantity of lumber, in feet, contained in those materials?

Answer. Witness does not know, as he is not a workman in wood, but of stone and brick, and cannot measure worked lumber.

3d Cross Int. What would it cost to transport this quantity of lumber from San Francisco to the places where it was to be used?

Answer. Witness does not know how much it would cost, but he supposes it would not be worth quite as much as the amount of his estimate, as the amount of goods is less, but the greater portion of the expenses would have to be incurred.

4th Cross Int. What number of men, exclusive of the vessel's crew, would a prudent man have taken to the several sites to aid in transporting this quantity of lumber from the landing to the several sites?

Answer. Witness would suppose six or eight men a sufficient number.

5th Cross Int. Is the estimate you now make in relation to these expenses founded upon the same evidence as that submitted to the Commissioner of Customs, December twentieth, eighteen hundred and fifty-four?

Answer. Witness says that it is.

6th Cross Int. In said statement you say that the several charges are itemized as nearly as can be done from recollection, memoranda and estimates.

Will you state if vouchers were taken for any part of these expenditures; if books of account were kept by you; and if not, what were the memoranda referred to? Please exhibit any and all such vouchers, books and memoranda.

Answer. There were no vouchers of any separate portion of the expenses of the last four houses; the amounts of money received by witness from the government, with the amount paid out by him, were kept in a book, with some vouchers for the same, but none of them are now in possession of witness, nor does he know where they are, as he handed them over to Gibbons & Kelly on his return to Baltimore.

7th Cross Int. Among the items of expense in said statement, charter of vessels is put down as among the expenses for each of the four light-houses.

Will you state if the charter-parties, or either of them, are in your possession? And if so, please exhibit them. If not in your possession, do you know where they are?

Answer. There were different vessels employed in the transporta-

tion of the materials, but in what way they were employed witness does not know; neither does he know what said vessels charged for transportation of said goods or materials, though paid for by witness. It was not an itemized bill, so as to enable witness to know the charge for transportation.

8th Cross Int. You have stated that the barque Oriole arrived at San Francisco on the twenty-eighth day of January, and the charter-party was dated on the eighth day of February, and you estimate the use of said vessel for the eleven days intervening, at eleven hundred dollars. As the freight of materials to San Francisco was paid by the government, was not the eleven days succeeding the arrival of the barque a reasonable time for the discharge of her cargo? If so, was it not included in the sum paid for the transportation to San Francisco?

Answer. Witness would suppose eleven days as sufficient time to discharge the cargo of the barque Oriole at San Francisco, but does not know whether it was included in the sum paid for transportation to San Francisco.

9th Cross Int. The maximum sum stipulated in the contract for the transportation of the "entire wood-work, exclusive of joists and rafters," from Baltimore to San Francisco, was twenty-five hundred dollars; would it cost more than this sum to transport the said materials from San Francisco to each of the several points where they were to be used? If so, how much?

Answer. Witness thinks it would cost more, but how much more he cannot say.

10th Cross Int. What is the distance from where the barque lay at San Francisco to Alcatraz island? What to Battery Point?

Answer. The distance to Alcatraz island, witness supposes to be between two and three miles; the distance to Battery Point about eight miles.

11th Cross Int. In your estimate for transportation to site at Point Loma, you include the cost of eight men two months, which includes time of passage both ways, as well as loading, unloading, and delivering at site, two thousand four hundred dollars; and you also include "hauling four miles to site, nine hundred and twenty-seven dollars;" would not this latter charge be included in the former?

Answer. Witness does not include the item of hauling in that amount, as one is for men and the other for teams.

12th Cross Int. In estimating the amount of transportation to the several sites, do you include all the materials for the light-houses or of the wood-work, inclusive of joists and rafters?

Answer. Witness only includes all the materials on board of the Oriole, assigned to the government, and by it transported to the several sites to be used.

13th Cross Int. At what would you estimate the cost of land transportation of the "wood-work, exclusive of the joists and rafters?"

Answer. Witness cannot say what the land transportation would be worth of the "wood-work, exclusive of the joists and rafters," but thinks it would not vary much from the amount estimated, as the greater part of the expenses would have to be incurred.

WM. J. TIMANUS.

Witness being asked whether he knew of any other matter relative to the claim in question, and if so, to state it, he answered that he knew nothing more relative to said claim.

WM. J. TIMANUS.

There being no further interrogatory to be propounded to William J. Timanus, his testimony was hereupon closed. And I hereby certify that the same was taken by and subscribed before me, in the city of Baltimore, and State of Maryland.

BOLIVAR D. DANELS, *Commissioner*.

Deposition of Henry A. Didier.

The deposition of Henry A. Didier, taken at the request of Gibbons & Kelly, on the thirteenth day of February, anno Domini 1856, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Gibbons and Kelly.

The adverse party was notified and did not attend.

1st Interrogatory. What is your name?

Answer. Henry A. Didier.

2d Int. What is your occupation?

Answer. Agent for the Insurance Company of North America, Philadelphia.

3d Int. What is your age?

Answer. Twenty-seven years.

4th Int. Where has your residence been during the past year?

Answer. In the city of Baltimore.

5th Int. Have you any interest, either direct or indirect, in the claim of Gibbons & Kelly, which is the subject of inquiry?

Answer. That he has none.

6th Int. Are you related in any degree to either of the claimants? and if so, in what degree?

Answer. That he is related in no degree with either of said claimants.

7th Int. Have you any knowledge of an insurance on the cargo of the barque Oriole, issued by the "Mutual Fire and Marine Insurance Company of Baltimore," to Gibbons & Kelly, in the year eighteen hundred and fifty-two? and if so, state what your knowledge is.

Answer. In the year eighteen hundred and fifty-two, witness was secretary of said company, and on the thirty-first of July, of that year, policy 1941, in the name of Gibbons & Kelly, was issued on the cargo of the barque Oriole, from Baltimore to San Francisco, on light-house materials and appurtenances, for thirteen thousand and eighty-five dollars (\$13,085) on a value of twenty-three thousand and eighty-five dollars (23,085.)

8th Int. Were you acquainted with E. Didier, who was president of said company when said policy of insurance was issued? and if you were, can you say whether he is living or dead?

Answer. Witness was acquainted with E. Didier, who was his father, and that he is now dead.

Witness being asked whether he knew of any other matter relative to the claim in question, and if he did, to state it?

Answer. Witness knows nothing more in regard to said claim.

HENRY A. DIDIER.

There being no further interrogatory to be propounded to Henry A. Didier, his testimony was hereupon closed. And I hereby certify that the same was taken by and subscribed before me, in the city of Baltimore and State of Maryland.

BOLIVAR D. DANELS, *Commissioner.*

Deposition of William Krebs.

The deposition of William Krebs, taken at the request of Gibbons & Kelly on the thirteenth day of February, anno Domini 1856, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Gibbons & Kelly.

The adverse party was notified and did not attend.

1st Interrogatory. What is your name?

Answer. William Krebs.

2d Int. What is your occupation?

Answer. Secretary of the "Ocean Mutual Insurance Company of Baltimore."

3d Int. What is your age?

Answer. Twenty-four years.

4th Int. Where have you resided during the past year?

Answer. That witness has resided in the city of Baltimore during the past year.

5th Int. Have you any interest, either direct or indirect, in the claim of Gibbons & Kelly, which is the subject of inquiry?

Answer. Witness has no interest, either direct or indirect, in said claim.

6th Int. Are you related to the claimants, or either of them?

Answer. Witness is related to neither of said claimants.

7th Int. Have you any knowledge of a policy of insurance issued by the "Ocean Mutual Insurance Company of Baltimore," upon the cargo of the barque Oriole, in the year eighteen hundred and fifty-two? If so, state your knowledge in regard to the same.

Answer. There is a record of said policy on the books of said company for ten thousand (\$10,000) dollars on light-house materials, from Baltimore to San Francisco, issued to Gibbons & Kelly.

Witness has compared the printed list of the articles on board of said barque, to be found on page 70 of Executive document, 33d Congress, 2d session, Senate, with the original application filed in said office at the time the policy was issued, and found the same to be an exact copy.

8th Int. Were you acquainted with Mr. L. Howell, who was presi-

dent of said company, when said policy of insurance was issued? and if so, can you say whether he is living or dead?

Answer. Witness was acquainted with said L. Howell, and that he is now dead.

Witness being asked whether he knew of any other matter relative to the claim in question, and if so, to state it?

Answer. That he knew nothing more in relation to said claim.

WILLIAM KREBS.

There being no further interrogatory to be propounded to William Krebs, his testimony was hereupon closed. And I hereby certify that the same was taken by and subscribed before me, in the city of Baltimore and State of Maryland.

BOLIVAR D. DANELS,
Commissioner.

Deposition of William H. Hemmick.

The deposition of William H. Hemmick, taken at the request of Gibbons and Kelly, to be used in the investigation of a claim against the United States, now pending in the Court of Claims in the name of Gibbons and Kelly.

The adverse party was notified.

1st Interrogatory. What is your name?

Answer. William H. Hemmick.

2d Int. What is your occupation?

Answer. Dealer in real estate.

3d Int. What is your age?

Answer. Witness is in his twenty-ninth year.

4th Int. Where has been your residence during the past year?

Answer. Baltimore city.

5th Int. Have you any interest, either direct or indirect, in the claim of Gibbons and Kelly, which is the subject of inquiry?

Answer. Witness has no interest, either direct or indirect, in said claim.

6th Int. Are you related in any degree with either of said claimants? and if so, in what degree?

Answer. Witness is not related to said claimants, or either of them.

7th Int. Please state in whose employ you were in the year eighteen hundred and fifty-two, and in what capacity employed?

Answer. In the year eighteen hundred and fifty-two, from the month of May to December, witness was employed by Messrs. Gibbons and Kelly as their clerk and disbursing agent.

8th Int. Please state whether or not you shipped a cargo of light-house materials in the summer of eighteen hundred and fifty-two to California, and the amount so shipped?

Answer. Witness did ship a cargo of light-house materials in the summer of the year eighteen hundred and fifty-two to California, from Baltimore, consisting of the following articles, for light-houses and

towers on the coasts of California and Oregon, the said goods being shipped on board the barque Oriole, viz: Manufactured wood-work, consisting of panel-doors, door-frames, window-frames, sashes and sills, mantels, cupboards, washboards and casings, shelvings, stepping of yellow pine for stairs, risors, carriages for stairs, newels, columns for towers, and the necessary stepping for the same; frames for eight kitchens, including the weather-boarding, flooring, window-sash, boards, and casements, joists and rafters, and sheathing for roofs; also a large quantity of one and a quarter Georgia prime flooring, large lot of prime white pine boards for under-flooring, insertion pieces for furring inside walls, furring planks, scantling for partition and putlocks; also joists and rafters for eight dwelling-houses, boards for sheathing roofs of main buildings, lathes, lineal four by twelve white pine for wall-plates, purlings; also a large quantity of scaffolding, planks and shingles.

Forty ninety (90) gallon oil-butts, one hundred and sixty-eight (168) rolls of tin-roofings, eight boxes containing tin-spouting, lighting-rods, and other lantern fixtures.

One hundred and fifty (150) pieces of brown stone, cut for lantern-decks, weighing seventy-five thousand three hundred (75,300) pounds, iron frames and doors for tower-decks, cut-stone doorways, and window-sills for Oregon tower.

Nails and hardware for eight houses and towers, eight iron hoops for towers, weighing six thousand and four hundred (6,400) pounds; cut-granite stepping for eight houses, seventeen (17) boxes of glass, linseed oil, white lead, and all the paints requisite; fifty barrels of cement; two carts and harness; hoisting tubs; two derricks, Manilla cordage and fifteen blocks for same.

Two surf-lighters, pumps for cisterns, and covering for the same.

Lumber for eight out-houses, two boxes containing sundry articles appertaining to said structures.

Lantern canisters, trivits, buff-skins, hand-lamps, and wick-boxes, for the lighting apparatus of eight light-houses.

Witness estimates the value of the foregoing materials to be twenty-three thousand and eighty-five (23,085) dollars.

9th Int. Please refer to Executive document No. 53, 33d Congress, 2d session, (Senate,) on pages 58, 59, 69, and 71, and say if you re-affirm the same?

Answer. Witness re-affirms all that is contained in the pages mentioned.

10th Int. Were the bills of lading of the materials shipped on board the Oriole at Baltimore assigned to the government of the United States? If so, state what you know of the assignment.

Answer. Witness knows that the bills of lading were assigned to the government, as required by the contract.

11th Int. Were you in San Francisco during the year eighteen hundred and fifty-two? If so, state, from your knowledge of the goods placed on board of the barque Oriole in Baltimore, what would be your estimate of their value when you were in California?

Answer. Witness was in San Francisco in December, eighteen hundred and fifty-two, and from his knowledge of the value of building

materials and other articles on board of the barque Oriole, witness knows the cargo was worth upwards of forty thousand (40,000) dollars in San Francisco at that time.

Witness being asked if he knew of any other matter relative to the claim in question, and if so, to state it?

Answer. That he could recollect nothing more.

WM. H. HEMMICK.

State of Maryland, }
CITY OF BALTIMORE, } ss.

On this nineteenth day of February, A. D. eighteen hundred and fifty-six, personally came William H. Hemmick, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness, and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of William H. Hemmick, taken at the request of Francis A. Gibbons and Francis X. Kelly, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of Gibbons and Kelly.

The adverse party was notified and did not attend.

BOLIVAR D. DANELS,
Commissioner.

Clerk's fee for subpoena.....	\$
Fees of witness.....	\$
Attendance	\$
Marshal's fee for summoning.....	\$
Marshal's fee for travel.....	\$
Commissioner's fees.....	\$

Testimony of William L. Hodge, on the part of the claimants.

1st Interrogatory. What is your name?

Answer. William L. Hodge.

2d Int. What is your occupation?

Answer. That of a general agent.

3d Int. What is your age?

Answer. Sixty years.

4th Int. Where has been your place of residence during the past year?

Answer. Washington city.

5th Int. Have you any interest, direct or indirect, in the claim which is the subject of the present inquiry?

Answer. I have none.

6th Int. Are you related to the claimant? If yea, in what degree?

Answer. I am not related to the claimant in any manner or degree.

7th Int. Have you knowledge of any contract between the claimants and the Secretary of the Treasury for the erection of light-houses on the Pacific coast of the United States? If yea, state the circumstances under which such contract was made, the person by whose agency it was made, and the contract itself, as fully as you can.

Answer. I have a full knowledge of the contract between the claimants and the United States, as it was made by me whilst I was Assistant Secretary of the Treasury. The whole discussions and negotiations connected with it were made by me, though the contract itself was executed by the head of the Department. The first contract for these light-houses was made with Mr. M'Ginnis, but from various reasons, and particularly the representation of some of the delegation from California that the sum appropriated was totally inadequate, I claimed from Mr. M'Ginnis security for the faithful execution of the contract for a much larger sum—say seventy-five thousand dollars—than otherwise would have been demanded. And I well recollect when I mentioned to Senator Gwin, of California, that I had made the contract within the limits of the appropriation, and the amount of the security I had demanded, he said the latter was very necessary, as the contractor would, if he completed his contract, lose at least that amount. And that amount of security was therefore required in order to indemnify the United States in case of a failure on the part of the contractors. Mr. McGinnis was unable to give the required security, and his contract was therefore cancelled, and application was made to Congress by the department for an additional appropriation, which was subsequently granted to the extent of a hundred and twenty thousand dollars. In the mean time, Gibbons and Kelly came forward and offered to accept the contract within the original appropriation, and to give the required security, for the conditions of which I refer to the contract itself and to the modifications made in a supplementary contract.

8th Int. Have you knowledge of any contract or arrangement between the United States and the claimants with regard to the transportation of the materials of said light-houses on the Pacific? If aye, state the same, with the attendant circumstances.

Answer. The department expecting to send one or more revenue cutters to the Pacific, agreed to transport in them, free of expense to the contractors, any articles or materials required for said light-houses, and which they might wish to send. In default of so transporting them by a public vessel, the United States were to pay the freight on the same by any private vessel. As the contractors intended to send a large quantity of the wood-work, and knowing the high rate of freights to that quarter, I feared that on the great bulk of such wood-work it would amount to a heavy sum. I therefore insisted upon a limit upon the amount of freight of such wood-work, and after a long discussion, and with great reluctance on the part of the contractors, they agreed to a *maximum* limit of twenty-five hundred dollars for the freight on all the timber-joints and wood-work, and with customary freight on the other articles and materials, if they did not go by a public vessel. As the United States did not send any cutter at the time, all the wood-work, articles and materials were

shipped by a private vessel, the freight on all which, including the two thousand five hundred dollars allowed for the wood-work, amounted to upwards of five thousand dollars, which was paid to the contractors by the Treasury, on account of the United States. I was afterwards informed, and believe, that but for the limit put on the freight for the wood, it would have been two or three fold greater, if estimated at the same rate per ton measurement that was on the other articles and materials, and which were the customary rate of freight of the day.

9th Int. Do you know anything relative to the advance of money by the government to the claimants for the purchase of the said materials? If yea, please state the amount of such advance, the reason why it was made, whether any security was given by the claimants to the United States for such advance by the transfer of the materials, bill of lading, policies of insurance, or otherwise, and all the circumstances attending the same.

Answer. Such advance was made to the contractors to the extent (if my recollection serves me) of about thirty thousand dollars, to enable them to pay for the said materials; and I believe they were entitled to such advance by a stipulation of the contract. As security to the United States, all these materials, including the entire cargo on board the vessel in which they were shipped, were transferred to the United States by invoice and bill of lading, the whole cargo going consigned to the collector at San Francisco, to be held by him for account of the United States, and only to be delivered by him to the contractors, at the sites of the respective light-houses, and to be used in their construction. All these articles were fully insured, and as an additional security to the United States in case of their loss on the voyage, the policies of insurance were transferred to the United States by endorsement of Gibbons & Kelly—I think to Thomas Corwin, Secretary of the Treasury, or to his successor in office, and the loss, if any, under the said policies, was made payable to him. I distinctly recollect receiving all the above documents, and writing myself the endorsement of transfer on the policies, which transfer was duly executed by Gibbons & Kelly. These invoices, bills of lading, and policies of insurance were in the Treasury Department up to the period of my resignation as Assistant Secretary of the Treasury, in March, 1853, which, however, (I understand,) have been mislaid and cannot be found.

10th Int. In what office were the documents and papers relative to light-houses filed at the time of said contract?

Answer. The Fifth Auditor had charge of the documents and papers connected with light-houses on the Atlantic, but not those on the Pacific, which were at the time kept in the office of the Secretary of the Treasury.

11th Int. Have these papers been since transferred to any other place or office? If yea, say where.

Answer. Since the creation of the Light-house Board, they have taken charge of all documents and papers connected with light-houses, at least to the extent of those connected with unfinished work, or other current papers to which reference might be required.

12th Int. Please give the names of the secretaries of the Light-house Board.

Answer. The name of the naval secretary is Commander T. A. Jenkins, and the military secretary is Captain Hardcastle, of the engineers.

13th Int. Have you any recollection of having been called upon by one of the claimants, with a request that you would point out the site of the light-house at San Diego? and what was your reply?

Answer. The contract provided for a light-house at St. Diego, in the words of the law itself, but the site of the light-house for that port had been selected by the Coast Survey at a point eight or ten miles below the town, of which fact I was ignorant at the time of executing the contract. The contractors refused to erect a light-house at the latter point, as it would be attended with great additional expense, and contended that as both the law of Congress and the contract required the light-house to be erected *at*, and not *for*, St. Diego, they were only obliged to erect it at the town, or in its immediate vicinity. The question was referred to Mr. Secretary Corwin, who took the same view of the subject, as Congress had not authorized the erection of a light-house at Point Loma, (the site selected by the Coast Survey,) but only at the town of St. Diego.

14th Int. Did you refer the claimants to Mr. Secretary Jenkins, with regard to the site of the light-house? And do you know anything of any difficulty which occurred in consequence of such reference?

Answer. I think I did refer Mr. Gibbons, in relation to the subject, to Mr. Secretary Jenkins, and I knew that there was some personal difficulty between them in connexion with this contract, the causes and merits of which were imperfectly known, and even that imperfect knowledge has escaped my recollection. Mr. Jenkins, I know, took the ground that the light-house ought to be erected at Point Loma, because the site had been selected by the Coast Survey, notwithstanding the wording of the contract.

WILLIAM L. HODGE.

United States of America, District of Columbia, Sct:

On this twentieth day of February, A. D. 1856, personally came William L. Hodge, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in presence of the commissioner. The deposition of William L. Hodge, taken at the request of Reverdy Johnson, esq., counsel for the claimants, to be used in the investigation of a claim of Gibbons & Kelly *vs.* the United States. Taken in the absence and with the consent of the solicitor of the United States.

True copy:

JOHN S. TYSON,
Commissioner.

COURT OF CLAIMS.

GIBBONS AND KELLY }
 vs. }
 UNITED STATES. } *Notes of Petitioners' Counsel.*

The following results are obtained by the opinion of this court on the construction and effect of the contract and the allegations in the petition, viz :

1. That the materials shipped from the Atlantic States by petitioners, and assigned to the Secretary of the Treasury, were the absolute property of the government.

2. That the \$35,000 was paid to the petitioners, in *payment* for the materials so assigned and delivered to the government.

3. That the materials so sold and delivered to the government were to be taken as a full *equivalent* for the \$35,000, otherwise the contract could not be supported under the statute of 31st January, 1823. (3 Stat. at Large, p. 723.)

Therefore, it is to be considered, that the petitioners sold the materials to the government at the stipulated and agreed price of at least \$35,000, without reference to what they actually cost, or the amount of the *invoices* or *insurance*.

By this contract the government actually saved \$5,000 and upwards, as these materials would have cost them in San Francisco upwards of \$40,000. (Hemmick's deposition, answer 11.)

Therefore, we start out with the established fact, that the government had purchased, for a full equivalent, all the materials necessary to construct the eight light-houses, and undertook to deliver these same materials at the sites where required by the contract.

On the other hand, Gibbons and Kelly undertook to erect the light-houses at the respective sites, out of and with these materials, when delivered by the government.

The materials were delivered for four light-houses, but in respect to two of these four, viz : Alcatraz island and Battery Point, the government failed to transport them from San Francisco, but the same was done by petitioners, and this constitutes the first item of their account.

1. The claim to compensation for transporting the government materials to Alcatraz island and Battery Point.

W. J. Timanus estimates this transportation of government materials at from \$6,000 to \$7,000, say - \$6,500 00
 (See answer 22.)

And in this he estimates land and sea transportation, and expenses of making a landing and roads.

But it may be said that the same witness shows that the whole transportation of the materials (shipped per Oriole, from the Atlantic States) to Alcatraz island and Battery Point did not exceed some \$450, after the arrival of the Oriole with the materials. (See answer 13.)

It is true that, by the contract, the government is only bound to transport the materials shipped from the Atlantic States, and to de-

liver them at the sites, and that the petitioners were to transport other materials, say bricks and stone, or to furnish them on the site, if they could be there procured.

But the government were bound to transport and deliver ; and if such transportation and delivery required new landings and roads to be made, we contend that, as between the parties, the government is chargeable with *the cost* of making the necessary roads for delivery. They have no right to cast on the contractors the expense of making the roads through which they delivered the materials, as stipulated. It may be that the contractors used these roads for the transportation of stone and bricks ; but, if so, they had a right to charge the *cost* to the government, *because it was* a stipulation that they exacted that the government should deliver at the sites certain articles ; and they, therefore, relied on the government making the necessary roads for that purpose, so that they could use them for their own materials. Therefore it was that they agreed to furnish at the sites the stone and bricks, not by express contract, but by necessary implication. They relied on the obligation of the government to deliver, and, if they chose, they could have waited until the government made the roads and transported the materials shipped in the Oriole, and afterwards carried their own over the same roads.

They had secured this privilege by exacting a stipulation, that the government was to *transport and deliver* whenever *required* by the *contractors*. If, therefore, the government failed to transport and deliver, and left that to the contractors, the contractors had a right to charge them for the making of roads and landings, even where they made such roads, &c., before the arrival of the *government materials*. In such case it is no answer to say that they made the roads, &c., for their own uses before the government used them. They certainly would not have undertaken to erect stone or brick towers at the respective sites, if they had not relied on the express contract of the government to deliver its materials *at the sites*, and thereby secured, at the government expense, the making of the *necessary roads*, and the uses of said roads, for the benefit of the contractors in respect to their own materials.

This is no case for apportionment, because the contractors had a right to say, make your roads and transport your materials, that we may carry our materials and men. The contract provides that the government shall take "*therewith*," in the *cutter* or other vessel, the artisans and *laborers* of the contractors, meaning *free of charge*.

The result is, that the contractors are not bound to do anything in the way of sending artisans, until the government have their materials ready to go with the artisans.

It is, therefore, clear that the contractors were not bound to make the roads and *erect the towers*, until the materials of the government and the artisans arrived ; and there is nothing, therefore, to prevent the *free use*, by the contractors, of the government roads for the simultaneous passage of their men and *materials*.

It is true, the government could have made their own roads and transportation, but they have not done so ; and the evidence is, that for making the landings, roads, and

transportation of *government materials* to Alcatraz and Battery Point, the reasonable charge is \$6,500 00
It is not a case for an apportionment between the parties to the contract.

2d item.—Loss of time, wages, &c., at shipwreck of Oriole, as claimed and actually paid..... 5,811 54
(Per Timanus, answer 21. As to legal right to recover these consequential damages or breach of contract by government, see 2 Parson's Cont., p. 461, in note to 13 Howard, 344.)

3d item.—Cost of transportation of materials and men to Cape Disappointment, after the loss of Oriole.
The sea transportation of materials is fairly charged (per Capt. Moore, answers 7 and 8) at \$6,000, subject (per his 9th answer) to a deduction of \$400 for not transporting lime, illuminating apparatus, bricks, stones, &c., which leaves a clear charge on this of..... 5,600 00
The sea passage of the necessary number of men, which was 18, (per Capt. Moore, pages 24 and 25,) was \$100 from and to San Francisco, and no more could have been obtained except on free passages (per Timanus,) which makes on this..... 1,800 00
To which add the expense of land transportation to the site at Cape Disappointment, as shown by Timanus in his answers..... 1,500 00
(See, on this, answers 32d and 33d.)
So that we have for Cape Disappointment a total claim of 8,900 00

4th item.—Humboldt bay.—We charge on this—
1st. For sea transportation of materials, making all proper deductions..... 4,400 00
(See on this Capt. Moore, answer 10.)
2d. Sea transportation of men to and from Humboldt bay 1,800 00
(See Capt. Moore, answers 7, 8, 13, and 5.)
3d. Land transportation at Humboldt bay..... 1,400 00
(Per Timanus, answers 32, 33, &c.)

5th item.—Point Loma.
1. Sea transportation of materials 5,600 00
(Capt. Moore, answer 11.)
2. Sea transportation of 18 men same distance..... 1,800 00
(Capt. Moore, answer 11.)
3. Land transportation of materials, say 2,750 00
(Per Timanus, answer 33.)

6th item.—Point Conception.
1. Sea transportation..... 5,000 00
(Capt. Moore, answer 12.)

2. Sea transportation of 18 men.....	\$1,800 00
(Capt. Moore, answer 7.)	
3. Land transportation, say	1,650 00
(Timanus, answer 33.)	

7th item.—

Loss of time of Kelly & Timanus, after completing the light-houses and until the acceptance—that is, from the 15th July, 1854, to 1st October, 1854, 74 days, at \$15 per day (Sundays off).....	1,920 00
(Timanus, answers 18, 19, 20, 25, and 26 ; Capt. Moore, answer 20.)	

9th item.—

For proportion of moneys deducted by government from contract price on the four light-houses, (the materials for which the government did not furnish)	19,560 00
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(Timanus, answers 34 and 16.)

Gibbons & Kelly having bought the materials and sold all to government for \$35,000, which they received, it was agreed in the contract that when the materials were delivered and placed in the light-houses, this amount should be refunded to government out of the \$136,000 contract price.

The meaning of which is, that the materials purchased by petitioners and sold to the government are to be resold to them when delivered at the site ; and in that case Gibbons & Kelly, getting the benefit of the materials, are to refund the \$35,000 at final settlement.

But where the government fails to deliver the materials for four of the light-houses, which was a condition precedent, or consideration on which they were to have the amount paid for those materials refunded, how can it be just or fair to make this deduction? This is too clear for argument, and it is the more unjust as Gibbons & Kelly had to purchase new materials at California prices.

The account is.....	68,861 54
From which deduct the credits given in our petition.....	9,139 00
	59,752 54

On the other hand, taking the charter-party as the guide, for the ten months after the loss of the Oriole until acceptance of last light-house, we have.....	30,000 00
To which add the transportation to Alcatraz and Battery Point	6,500 00
And amount illegally deducted on the four last light-houses,	19,560 00

And damages by loss of wages, &c., at shipwreck.....	\$5,811 54
And loss of time of Kelly & Timanus.....	1,920 00
	63,791 54
Credits for payments	9,139 00
	54,652 54

R. J. BRENT.
REVERDY JOHNSON.

Amended account of Gibbons & Kelly, filed by leave of the court.

UNITED STATES,

1853.	To GIBBINS & KELLY, Dr.	
Feb. —.	Transportation, making roads, landings, &c., from San Francisco to the sites of light-houses on Alcatraz island and Battery Point.....	\$6,500 00
	To loss of time, wages, and damages by failure of government to deliver at Cape Disappointment materials lost on board the Oriole.....	5,811 54
1854.	Transportation of men and materials to Cape Dis- appointment, and making roads to light-house site, and returning men to San Francisco.....	8,900 00
	To do. to Humboldt bay	7,600 00
	Do. Point Loma	10,150 00
	Do. Point Conception.....	8,450 00
Oct. —.	To loss of time of petitioners Kelly & Ti- manus, waiting for approval and acceptance of light-houses	1,920 00
	To amount illegally deducted by the United States government for the proportion of \$35,000 paid to petitioners, claimed by the government to be chargeable on the four light-houses erected after the loss of the Oriole.....	19,560 00
		68,891 54

CR.

By credits stated in the original account filed with petition.....	9,139 00
	59,752 54

BRIEF OF THE UNITED STATES SOLICITOR.

Liability for loss on the Oriole.

The first question presented by the petition is in relation to the liability of the United States for certain articles lost *in transitu*, whilst in the possession or in the custody of the United States. The contract is for the construction of seven light-houses in California and one in Oregon, for which \$136,000 was to be paid—the United States to furnish or pay for transportation of a portion of the materials; and, in consideration of the advances of money which contractors will make for materials for said light-houses, the United States also agree, upon the assignment of the bills of lading and policy of insurance and giving bond, to advance or pay \$35,000 to the contractors, which is “to be deducted from the specific payments on each light-house as the same are respectively finished, in a *pro rata* proportion.”

The articles were not to be delivered to the contractors at San Francisco, but to the collector there, and were to remain subject to his authority till delivered at the several sites, &c. The contractors had, however, the right to ship the articles direct to the sites, without touching at San Francisco.

They were, however, shipped to San Francisco, where the Oriole, a vessel belonging to the contractors, was chartered, at \$3,000 per month, by the collector; and the contractors “engaged to land and deliver the materials at the sites,” &c. On a voyage from San Francisco the vessel was wrecked, and materials, valued at \$10,000, were lost. Not only this loss, but certain consequential damages, amounting to \$5,000, is claimed.

The court in considering heretofore the question of the liability of the government to make good this loss—without, as I understand it, determining the question fully or finally—authorized the taking of testimony respecting this loss, chiefly on the ground that, as the act of January 31, 1823, 3 Stat., p. 723, says, “*no advance of money shall be made in any case whatever*, but in all cases of contracts for the performance of any service, or the delivery of articles of any description, for the use of the United States, payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment;” and as the advance in this case would be in contravention of the act, unless the articles covered by the bills of lading were considered as *delivered* to the United States, and paid for by the advance, the effect of the proceeding must be considered as vesting the absolute property of those articles in the United States, in order to make the act of the Secretary consistent with law.

This view of the subject was not presented by either counsel for the petitioners, in either of the very able arguments made to the court; and as it seems to me not to be well founded, I beg to submit a few objections to it.

1. The contract is for light-houses, and not for the materials to make them, and the advance is to be deducted *pro rata* from each as they are finished; it could not, therefore, be taken as payment for the

materials. The terms of the contract forbid any claim being made for credit at the treasury on account of *materials*. The credit is to be made on the *houses*.

2. The rule quoted from Coke (p. 9 of the opinion of the court) does not admit of the charitable construction which the court is disposed to give, save where the words of the parties "may have a *double* intendment." Here it cannot be intended, from anything said in the contract, that the *advance* payment was *not* a payment in advance on account of light-houses, but was a payment contemplated by the law of 1823, *due* for materials delivered.

It might be said with reason that there is no culpable violation of the law to make advances to contractors in such a case as this, co-extensive with their advances for materials, the materials being put in the keeping of the public officers till they were finally applied to the object of the contract. But in such a case, as where the contract was for a house, and by the terms of it the payments were to be applied to the house when finished, it would be a very forced construction to convert the transaction into a purchase of materials to legalize the *advances*. This, however, is not the construction given to such transactions. See Tillotson's case, 1 Payne C. C., p. 332.

This was a suit against the sureties of a contractor for building a fort, to whom *advance payments* on materials delivered were made. The court say that *the materials* did not become the property of the United States by such payments, and that the government had merely a lien on them, and that the sureties were liable for the application of the materials to the use of the government.

3. But the fact that the amount advanced was \$35,000, and the value of the articles was only about \$23,000—being an excess of \$12,000—of itself shows that the payment was not for the articles shipped, and shows, moreover, that even on the charitable construction given by the court, the law was violated.

4. The object for which this was done is rendered very plain by the testimony of John McGinnis. That testimony declares the fact that no advertisement was made inviting proposals to build these light-houses, as the law requires; that the contract was given ostensibly to a clerk in the department, but was, in fact, only held by him to be sold for the benefit of certain favorites of the department, to whom part of the appropriation was paid, although it was then said, and is now sworn by the Assistant Secretary, that the appropriation was inadequate to the object; and these petitioners are *particeps criminis*, because they not only bought McGinnis out, but they bought important modifications of the contract, for which they paid \$15,900. (See testimony of Gibbons, p. 63, Senate Rep. 1.)

The law has therefore been not only violated, but violated in a very culpable manner, in not only advancing money to the amount of the materials, which might be excused, but advancing the amount required by the party to pay for the contract; and it cannot be imagined that either party to this proceeding believed this to be right or legal. And now, when the court is considering the facts in proof, it will not, I think, decide that this \$35,000 must be considered as the purchase-money of articles lost on the Oriole, when it is not only expressed in

the contract that it is an *advance payment* to be placed to the account of the buildings *pro rata*, but it appears that it exceeded the value of all the articles shipped, probably \$15,000; for that amount was taken out of the treasury to pay for the contract, and the witness of the claimant only estimates the value of the articles shipped at \$23,000.

5. As it is altogether upon this ground that the court proceeds in its opinion, I should think myself warranted in concluding that the grounds on which the cause was argued by the claimant's counsel were overruled. Nothing but the force of a special statute could change a transaction, which ordinarily would be nothing more than taking security for advances into the purchase of articles, and make the United States owner instead of bailee. As the statute does not so operate, and the United States is but a bailee, bound to transport *some* of the lost articles, and authorized, for the security of its advances, to have an officer in charge of the rest, the relation of the government is not that of owner, who has contracted unconditionally to deliver, but of a special bailee, who has agreed to deliver, and upon whom no more than ordinary care is devolved, as the court shows in its opinion, (p. 11.)

6. If there were any doubt, however, on general principles, that no liability attached to the United States for the loss on the Oriole, there could be none on considering the terms of this contract. By this contract, so far from its being contemplated that the government should insure the materials thus put in its charge for security, the contract requires that the materials shall be insured by the petitioners, and the policy assigned to the government. What does this stipulation mean—that the goods shall be insured only part of the way to their destination? Certainly not. Does the fact that they were insured only part of the way affect the construction of the contract as to where the obligation to insure rests? The *advance* was paid, it seems, on a policy in an office at San Francisco; whether the other policy was the same in this respect, does not appear. But it might have been paid without any policy at all. The omission to exact all that was required by the contract argues nothing against the plain language of the contract itself. But when it is very manifest that those who had charge of this business were not disposed to be exacting, and probably would not have rejected the policy if they had noticed the deficiency, it is of no moment.

(See also affidavit of Hemmick, (p. 70,) and Hodge's deposition, showing the understanding of the parties, that this transaction was but an assignment for security, and not in full property.)

The contracting parties designed to violate the law.

The original contract stipulated to pay.....	\$136,000 00
By the second modification there was added, (p. 17)....	7,500 00
	143,500 00
By exhibit B, (p. 16,) the French lens was substituted, and fog-bells dispensed with.....	8,561 92
Leaving this amount to be paid on finishing contract	134,938 08

Brought forward.....	\$134,938 08
All of which has been paid, and besides \$22,200, \$20,826 60, and \$5,413 20 for transportation. (See report of commissioner, p. 23, Doc. 53).....	48,439 80
Making a total of.....	<u>183,377 88</u>

It appears, therefore, that on a contract under an appropriation which authorized the expenditure of \$158,140 for the construction of *ten* light-houses, *including transportation*, and also the placing of buoys, fog-signals, &c., (see 9th vol. U. S. Laws, pp. 503, 428,) the Secretary agreed with the contractor to pay him \$134,938 08 for merely putting up the walls and wood-work of *eight* of them, and covering them; the *transportation* of the wood-work to be furnished or paid for by the United States, and the United States also to provide and transport the illuminating apparatus. It is manifest, therefore, that whilst the parties were professing to contract within the appropriation, which was the only authority to contract, they must have known that they were exceeding the appropriation and violating the law.

The clauses respecting transportation made with the design to defraud the government.

Again: It appears by a letter of Mr. Gibbons to Hodge, that his only inducement to take the contract was an *understanding* that he should be paid profits on the transportation to an amount to make good his losses on his contract to put up the buildings. (See p. 71, Ex. Doc. 13, 2d sess. 33d Cong.) This is an admission that he bought the contract for the privilege he was to be allowed of speculating on the government in the transportation; and the letter proves that Hodge concurred in this design. The contract appears to be a contract for the construction of light-houses—the price apparently brought within the appropriation, by an arrangement that the transportation should be done in revenue cutters. But the contract for the building, it appears by Gibbons's letter, was altogether a secondary affair, and the provision about transportation in revenue cutters was all *gammon*. It was contemplated from the first that Gibbons & Kelly should have the transportation at unlimited prices, (see argument, pp. 140, 141,) to indemnify themselves for the known inadequacy of the price to be paid for the buildings. It was not thought safe, however, to put this arrangement into the contract. It was to be the practical working of it rather than its ostensible design.

If this be legal, is it not a farce to speak of Congress as holding the purse-strings of the government, or exercising any control over the amounts to be appropriated to specific objects?

The design carried out in the shipment from Baltimore, and in the charter-party of the Oriole, all charged to the United States.

It is not necessary to consider the economy or propriety of the charter-party of the Oriole, by which it was no doubt intended to reap

these profits, but which unluckily was brought to an end by the wreck of the vessel off Cape Disappointment. It may be observed, however, that the rights of the United States, even as loosely guarded by this remarkable contract, were utterly overlooked both in the charter-party and in the shipment from Baltimore. The United States only obliged themselves to transport the illuminating apparatus, lantern, fixtures, and wood-work, except the joists and rafters, and also the oil-vessels and tin, or to pay for such transportation, provided that the entire freight on the wood-work shall not exceed \$2,500. The illuminating apparatus and fixtures were not sent, (the French apparatus and fixtures being adopted.) Besides the lumber, there was shipped nothing, therefore, for which the United States was bound to pay freight, except the oil-butts, and the tin for the roofing and spouting of the light-houses, for which there was paid the enormous sum of \$5,413 20, being nearly \$3,000 for transporting the oil-butts and tin to San Francisco. The value of half this wood-work and lumber, according to Timanus, was \$2,691; ditto oil-butts, \$800; ditto roofing, \$343; ditto spouting, \$137 50; = \$3,371; so that the whole of it was worth \$8,142, or \$2,729 more than it cost to take it to San Francisco. The oil-cans and tin were entirely insignificant in bulk and weight, compared with the rough and worked lumber for all the houses; and yet for these article the charge was near five hundred dollars more for the transportation, and all the money was advanced. (See Rep. of Com'r, p. 23, Doc. 53.)

The box invoiced at \$2,500, it will be seen by reference to the invoice, (p. 70,) did not contain lantern fixtures, but oil measures, &c. It will serve to illustrate Mr. Timanus's accuracy, to observe that the whole contents of the box was invoiced at \$2,500, whereas he charges half at that price after the wreck. It is manifest that the United States was made to pay freight for the whole invoice, including masonry, hardware, carts, derricks, joists, and rafters, &c., even from Baltimore.

This is not disguised when it comes to ship them from San Francisco. Then the Oriole is chartered at \$3,000 per month, to ship the entire outfit for the buildings; and when Mr. Timanus and Captain Moore, the claimant's witnesses, are asked about it, they answer that freight, labor, &c., were enormously high, and nobody else would have taken the job so low; and it made no difference that the United States was obliged to pay all, because it would have cost as much almost to send a vessel empty to these sites as with a full cargo; and as the United States had to send a vessel and pay \$3,000 a month to take the wood-work, it cost them nothing to take Gibbons and Kelly's part of the cargo along. This is accommodating, certainly. It would appear more equitable, it seems to me, however, if the arrangement had been to require the parties to pay according to freight and the advantage received by each. Why should the United States, which had much the least freight and none of the passengers, pay the whole charge, not only for the transportation, but for victualling the hands of the contractors? There never was a more obvious imposition. The extent of the obligations of the government was to transport certain wood-work, oil-cans, &c.; and with no other ground than this to go

upon in the contract, Mr. Saunders assumes to transport the whole of the materials of every description, and transport also the men and artisans, and board them whilst they are putting up the work. He might with equal propriety have paid the men for putting up the work, and Mr. Timanus for superintending it, besides paying the contract price for the structures; and this, if not something more, is manifestly what is attempted to be obtained from the government.

Balance claimed for transportation.

The amount claimed on the charter-party, as well as for the transportation to San Francisco, has been settled; but as these transactions bear a family likeness to the other proceedings of these parties, they prepare us in a degree for the consideration of those here presented.

These are, first, for transportation to Alcatraz island and Battery Point, before the charter-party, or at least not embraced in it; and to Point Loma, Humboldt bay, Cape Disappointment, and Point Conception, after the wreck.

They claim a balance on account of the two first, of \$4,410, (see p. 6 of petition,) and on account of the four others, \$22,451—total \$26,861. The basis of the claim for the first two is an estimate of the witness, Timanus, (see answer to interrogatory 22,) putting it at \$6,000 or \$7,000.

The basis for the other four is his answer to 24th interrogatory, where the witness thinks there was need of transportation for ten months after loss of Oriole, in August, 1853, before the light-houses were furnished, and therefore charges \$30,000.

All the transportation imposed on the United States after the wreck, and a profit on it claimed besides, and all covered up by the refusal to furnish vouchers or accounts of actual expenditures.

The witness does not profess to have kept any separate account of anything done. He manifestly charged every expense connected with the transportation to the United States, (see his answer to 3d cross-interrogatory—also to 6th, 11th, 12th and 13th,) because all the property was assigned to the United States. He also manifestly maintained the men at the charge of the United States, and probably included everything in his calculations. This is apparent from the whole tenor of his testimony; and the fact stated in his depositions, that he kept a book of his receipts and expenditures, which he delivered to his employees when he returned to Baltimore, and which, it appears by the letter of Gibbons & Kelly, (p. 54 and 55,) they declined to lay before the Commissioner of Customs, affords the strongest confirmation of this view of the subject.

The pretence upon which they declined showing any particulars of disbursement, and determined to rest their claim for the allowances on general estimates, predicated on the general high prices of California, without the production of vouchers, was another convenient form to carry out the scheme, frustrated in the wreck of the Oriole, to indemnify themselves for all purchase-money of the contract, all their losses

in performing it, and furnish liberal profits for their attention to it. They assert that they were not bound to produce vouchers for money expended, but were entitled to compensation for services under contract; and as the transportation was unlimited, they are at liberty (in effect) to charge what they please.

Now, if we admit that the collector of San Francisco had the power to contract with Timanus to do the transportation, and did contract, as alleged in the testimony of the witness, there is no ground for assuming that he agreed to pay \$30,000, or anything more than cost, and, at most, a reasonable allowance for the trouble attending the procurement of the transportation. Although Mr. G. speaks of the contemplated profits to arise from this as the means of indemnifying him, &c., I repeat, that it was not deemed safe to frame the contract so as to allow him such profits by force of its terms. On the contrary, the supplementary *mem.* of May 21, p. 134, speaks of this allowance for transportation, in case he should provide it, as "*their right to be reimbursed the cost of transportation thereof;*" and although these words follow, "*from the Atlantic coast to San Francisco,*" there is no distinction in the language of the contract with respect to the transportation to be done on the Pacific coast which would give a different rule for fixing the compensation there. And this is in keeping with the nature of the contract, which was ostensibly for the construction of light-houses. Legitimately, profits could not be made on so much of the transportation as was primarily undertaken by the government if it failed, and the contractor had to do it; to reimburse his outlay, and, at most, pay for his additional trouble, would be all that could be required in equity.

Would it be tolerated that one should charge enormous rates for the hire of a horse which he was incidentally obliged to use in order to fulfil a contract to build a house, or the like?

But the party here refuses to show what he paid for transportation; says he kept no separate account of what was done for the United States, and undertakes to lump the job.

It is only necessary to note the amounts, to see the gross exaggeration of the charges. There has already been paid the enormous sum of \$48,439 80 for the transportation of property not worth \$10,000. The lumber, one-half of which is said by Timanus to be worth \$2,600, being the only portion of it of any bulk, and that being mostly worked lumber, doors, window-frames, &c., for eight very small one-story houses, 38 by 20 feet, could not occupy much space, or be very weighty. (See dimensions of the houses, p. 75, Senate Rep. No. 1.) How this enormous sum of near \$50,000 could have been earned in the transportation of this amount of property, is inconceivable. It is more than \$6,000 for each light-house. It would buy half a dozen vessels of 500 tons burden. It would buy a vessel and pay seamen, even at California prices, for double the length of time pretended to be charged for by the claimant.

But when we find an additional claim preferred on account of transportation of \$32,521 on one basis, or of about \$34,000 on the other, after allowing all credits, making a sum of upwards of \$80,000, it is perfectly manifest that the immense sums already obtained have been

obtained by making enormous claims, with the expectation of great reductions being made; and that this is the system practised is yet more obvious by the swelling which has been going on in these figures even since the claim was filed.

The character of the proof offered originally is the same now presented—nothing but loose estimates of what it might cost to do the job under California prices. Not a syllable as to the actual cost; the books containing that account studiously withheld, and the place supplied by loose estimates, which are merely matters of opinion, which vary with the individual. If the contract allowed the payment of a *quantum meruit*, and was not merely to reimburse the claimant, to ascertain what that was we must know what was actually paid. If the party had owned or used a vessel of his own, as was the case with the Oriole, proof of the value of such vessel and the actual time of the use might be admissible; but when the transportation was not done in his own vessel, the attempt to substitute loose estimates for the actual transportation—proof of which he has in his own books—shows that the actual transaction was done at a very different figure from the estimates.

From the nature of the case, the actual payment is necessarily an element in the calculation of what ought to be paid by the government. Gibbons & Kelly having procured it to be done in the vessels of other parties, cannot possibly *deserve more* from the government than what they actually paid, and a small commission, perhaps, for procuring the service. If, on the production of the vouchers for such payments, there was reason to suspect fraud, it would be admissible to show that they paid ordinary rates, by the testimony of ship-brokers, &c.; but to *suppress* the direct evidence of the actual payment, and resort to evidence which is only admissible when the facts cannot be proved, or in aid, is to suppress the best evidence, and admit evidence not only secondary in its nature, but which avowedly would conflict with the books and accounts of the actual transaction.

To return to the consideration of the items of this account:

1. *The claim for transportation to Alcatraz Island and Battery Point.*

The charge for this in the petition is \$6,000, so charged originally, and sworn to by Timanus, (see his affidavits and account in Doc. 53, p. 32,) and this included \$550 storage in the Oriole. But since the opening of this cause we have an amended account, stating this item at \$6,500, on the strength of Timanus' recent deposition taken at Baltimore, where he swears it was worth \$6,000 or \$7,000 to transport *the materials* to these points, without storage. (See his answer to 22d interrogatory.)

It is obvious from this answer that the cost of transporting everything is included, and this is rendered still plainer by the answers to the 10th and 13th interrogatories, where the statement is made that the transportation was nearly completed to these points before the arrival of the Oriole, and not more than \$400 or \$500 worth afterwards. (But see Hemmick's testimony, p. 59, where he says nothing was done till the Oriole arrived!) The explanation given of this in argu-

ment is, that though none of the articles which the government was bound to transport were delivered till after the light-houses were nearly completed, yet as the roads were to be made at great expense, to carry the articles over them, it is fair to charge the government with the making of the roads, though made for the purpose of carrying the other articles over them. Unfortunately for this theory, the specifications given in his statement, at p. 32, referred to by his counsel, are altogether inconsistent. There the account is made up thus :

Use of barque (Oriole)	\$550
Lighterage	450
Wharf and hoisting at island	200
Eight men, 25 days, delivering materials and making road ...	1,400
Boarding men, 25 days	400
	3,000

The assessment for Battery Point is very similar, except that the item for road-making and hauling together is only \$380.

We have the statement to begin with, that but \$400 or \$500 was spent after the arrival of the Oriole on the transportation of the materials for these two points. It was necessary to make this statement, in order to make a charge for these points not covered by the charter-party. As these were the first houses completed, to accomplish that, the work must be antedated. But in shunning Scylla, they run into Charybdis; for it happens that the government was not bound to transport anything except what was on board the Oriole, a fact which neither the claimants or Timanus bore in mind in making up the account. The account is, indeed, an apt illustration of the necessity for good memories in those who falsify.

Nor does the fact stated, that the materials were carried on the men's backs, stand well with any claim for great expenditure on account of road-making, nor is it very credible that money was spent in making a road between the Presidio and Battery Point, two military stations now, and ever since the earliest history of the country.

But the least examination of these items, 8 and 9, (p. 32) shows that it is impossible that any considerable part of either of them can apply to the transportation of the materials which the government had to deliver. Take the item of eight men for twenty-five days. The fact appears in answer 9, that Timanus arrived at San Francisco on 17th December; and before the barque arrived, on the 28th January, he had nearly finished both of the light-houses in the harbor. Besides the impossibility of employing eight men twenty-five days in carrying a few thousand feet of lumber, &c., and the door-frames, &c., for the keeper's lodge, the comparison of dates shows that this must have been the whole time during which the laborers were employed. And, as it is said in the note, that the mechanics were employed in this work of transportation in order to justify the prices, (although, by the way, it appears by Mahon's affidavit, p. 64, Ex. Doc. 53, that no such prices were paid,) it is probable that the prices spoken of cover the entire expense of the work.

But it is probably neither true that the work was done before the arrival of the Oriole, nor that any considerable expense was laid out in making roads, because the items for road-making in Timanus' estimates are not separated from the amounts charged for the labor of men in delivering materials, and this only amounts to \$1,400 in one, and \$1,200 in the other. It is, therefore, perfectly clear, that no considerable amount was expended in making roads at all.

Further conflicts in the testimony.

As to the rates charged for labor, this is contradicted by Roger Mahon's statement, (p. 65,) where the price of laborers is fixed at \$60 per month, and none of the mechanics received the rates allowed for labor only by Timanus in his account. The truth is, there are no two of these witnesses consistent with each other, nor any one of them who has made statements at different times who is consistent with himself. We have already seen the contradictions of Timanus by Hemmick and Mahon, and by himself. Now compare Timanus and Captain Moore. Moore, in answer to 8th interrogatory, says, that \$6,000 was the least that a vessel could be got to go for to Cape Disappointment. Timanus swears, (p. 31, Ex. Doc. 31,) that a vessel was chartered actually for that voyage for \$1,000.

Moore (answer 10) says \$4,400 was the least for a voyage to Humboldt bay. Timanus (p. 31, Doc. 53) swears a vessel was chartered at \$900.

Moore, (answer 11,) to Point Loma, \$5,400. Timanus, (p. 32,) to same, \$1,200.

Moore, (answer 12,) to Point Conception, \$5,000. (Timanus, p. 31,) to same, \$1,000.

Compare Mahon with Moore on transportation of men. Moore says passage was \$50 in sail-vessels, and \$75 in steamers, each way, (see 8th interrogatory and 4th and 5th cross-interrogatories); and on that testimony \$1,800 is charged on each light for transportation of men; whereas Mahon paid only \$280 for transportation of all the men from Oregon after the wreck, and \$112 50 for the passage of the superintendent, agent, and Mr. Kelly.

2.—*Transportation, &c., to Cape Disappointment and the three other light-houses.*

With respect to these, also, the claim presented by the counsel at the trial assumes a different shape from that presented in the petition. Now it divides itself into three items for each light: 1. Transportations of materials to landing; 2. Do. artisans; 3. Do. from landing to sites of light-houses. For the first two Capt. Moore is witness; for the last, Timanus responds in each. I have said all in relation to the facts I think it necessary to say on the first two, in showing the conflict in the testimony of the witnesses.

As to obligation of the United States to transport the artisans.

It is claimed that the United States were bound to transport these men and return them, because the contract requires the contractors to have them ready to accompany the vessel which carries these materials to the light-house. It certainly does not follow from this that the United States is bound to provide for their return passage. Nor is it by any means clear that the obligation *which the claimant was under*, by the contract to send men along in a revenue-cutter, or other vessel provided by the United States, imposed an obligation on the United States, when they do not furnish a cutter or other vessel, but the alternative is taken of permitting the contractors to have the transportation, done as suits their convenience, of paying for the transportation of Gibbons & Kelly's workmen, as well as for the transportation of that portion of the materials which they had undertaken to pay for.

As to the liability of the United States for the land transportation of the materials.

Connected with this is the subject of the liability of the United States for the land transportation, or transportation from the landing to the site of the building, or to the vessel or vessels at San Francisco.

It is certain that it was not contemplated that the government should pay any charges connected with the shipping of any articles at Baltimore. With respect to that, the agreement is, "that in case a revenue-cutter, or other public vessel, should be proceeding to the Pacific coast when the articles are ready for shipment, that the same *will be taken on board of said vessel and delivered*," &c. "In the event no such vessel is sent, as aforesaid, that then the said party of second part will be bound to otherwise *transport* the said articles, *free of freight*, to San Francisco;" "and in case the articles are transported by the parties of the first part, the party of the second part shall pay the usual and customary freight thereof." With respect to the transportation from San Francisco, the agreement is: "And it is further agreed and stipulated, that the said articles, so to be shipped as aforesaid, are not to be delivered to the said parties of the first part, at San Francisco, but the same are to remain in the possession of the collector until delivered at the several points where the same are to be used, and to which places they are to be transported under the authority of the said collector, when required by the said parties of the first part." If the provision had stopped here, it would not be intended that the United States should pay for the transportation of any of the articles beyond San Francisco. The contract imposes this, by necessary implication, on the contractors except when it is expressly undertaken by the United States, because the contractors have undertaken to build the houses and supply the materials. As far as San Francisco, we have seen, the United States have expressly undertaken to transport part of the materials free of freight, or to pay the freight; the provision which follows, that these materials shall not be delivered to the contractors at San Francisco, but shall remain in pos-

session of, and be transported under the authority of the collector, to the places where they are to be used when required by the contractors, is not an agreement equivalent to the previous agreement to transport these articles free of freight to the contractor—it is only equivalent to so much of the previous provision as requires the bills of lading to be assigned to the United States, which was done for the security of the government for the \$35,000 advance; and it was thought prudent to keep the like possession of the property in the officers of the United States till it was applied to the use of the government. But the language which immediately follows that quoted, viz: “in a revenue-cutter of the United States or other vessel,” is equivalent, and no more than equivalent, to the stipulation, in the preceding paragraph, to “transport the said articles *free of freight* ;” for it cannot be supposed that the United States intended to undertake any land carriage in a revenue-cutter or other vessel.

Again, the provision that the articles shall be delivered to the collector free of freight, and shall remain under his authority till delivered, excepts them from the charge for freight, but from no other charge which might accrue, or which might be properly incurred in carrying out the trust imposed upon him by the contract—a trust created for the accommodation of contractors, by enabling them to receive the advance on the one hand, and for the security of the government in making it on the other.

It is impossible, therefore, on legal principles, to make the government responsible for any charge except freight, and that has been fully paid, as is shown by Gov. Anderson’s report, p. 29 *et seq.*, Ex. Doc. 53.

If, however, a liability should be allowed to exist, there is no testimony but that of Timanus in relation to these charges; and this is all estimates—no items or facts are given, and it is impossible for the court to form a satisfactory judgment on it. Can a party ask the judgment of a court in his favor, on proof of expense incurred and service performed, part of which is on his own account, and part for the defendant, without showing what was the cost of so much as is chargeable to the defendant?

The claim for time lost by Timanus & Kelly.

On what does the charge rest for lost time of Timanus & Kelly, whilst waiting for an inspector, from July to October? No clause of the contract is cited, no principle is stated, in the petition or in argument in support of it. Why not charge for the mechanics also, who had been employed on this work, as well as for Timanus & Kelly? And, by the way, why charge \$15 per day whilst waiting for the inspector, when Mahon says \$5 per day was the wages of the superintendent? (See his affidavit, p. 65, Ex. Doc.) Or why should Gibbons now think Kelly’s time worth \$15 per day, when he thought \$10 enough, March 13, 1854? (See his claim, p. 65.)

Was it necessary for Timanus to keep Kelly in California during this time to help him to do nothing? What was the use of his staying there himself? For when asked by his employer (interrogatory 28)

what he would have done in case the inspector had required anything more to be done on the light-house before approving and accepting the same, he answers: If the demand had been reasonable he would have complied with it; but if it exceeded the amount already expended on them, he thinks he would have refused. So he stayed there doing nothing, and intending to refuse to do anything if it cost anything to do it.

But he says, in the same answer, the contractors could not get their money till the work was approved. How did his staying there, if he intended to do nothing, help the approval of the work? Does any one who contracts with another for work, contract to pay for the time intervening between the time when the work is finished and the time when it is accepted? No agreement of that sort is implied, and none is expressed in this contract. But if it were a default, there are plenty of compensatory failures on the part of the contractor. For instance, they contracted to finish all these structures by the 1st day of November, 1853; they did not finish them till nine months afterwards.

In conclusion. I have demonstrated, chiefly on the testimony and letter of Gibbons himself, the fraudulent character of the contract, and that he was not only a party to it, but the *principal party*, without whose agency the design would have fallen through; the party who first bought himself into the contract, and then bought modifications of it to suit him; and who, although he paid the money to Delano, the tool, dealt directly with Hodge, for in his letter to Hodge he speaks of their *understanding* as to the manner in which his outlays were to be reimbursed. Such I have shown to be the character of this transaction in its incipency, and such I have shown it to be in every successive step taken in it. The subsequent acts appropriating money—the first, as appears by Hodge's deposition, applied for before the contract was entered into, and granted before it was known to be taken; and the other granted before any question was made of the complicity of the contractors in the fraud, and without being asked for or intended to legalize their demand—cannot have that effect. So that if the court should sustain my views as to the intrinsic character of the transaction, there is no impediment to the maintenance of the defence founded on it arising from those appropriations.

But if the court should think I have not made out fraud, I should still confidently expect a judgment for the United States, on the ground that much more has been paid than the evidence shows the claimants to be entitled to, on any view which can be taken of it.

M. BLAIR.

Appendix.

Joists	2,088'	board measure.
Floors, double laid.....	2,592'	"
Trussed ridge for rafters.....	338'	"
Sheathing for roof.....	806'	"
Rafters.....	604'	"

Rafter plates	152'	board measure.
Boarding for lantern.....	100'	"
Timber laid in brick-work for same.	40'	"
Porch	682'	"
Out-house.....	230'	"
Window-frames	180'	"
Doors and door-frames.....	615'	"
Stairways (?)		

Total without stairways..... 8,287' board measure.

Joist and rafters deducted..... 2,692'

5,595' board measure.

WASHINGTON, D. C., April 8, 1856.

The above computation made upon specifications for a light-house, in Senate Report No. 1, special session, 1853, page 75.

B. OERTLY,

Measurer Treasury Extension.

GIBBONS & KELLY vs. THE UNITED STATES.

On the final hearing on the evidence, the opinion of the court was delivered by SCARBURGH, J.

By an act of Congress approved September 28, A. D. 1850; an act approved March 3, A. D. 1851, and an act of August 4, A. D. 1854, various appropriations were made for light-houses, and "for completing the light-houses" in California and Oregon.—9 Stat. at L., 500; 9 *ibid.*, 628; 10 *ibid.*, 563. See opinion of the court in this case, delivered January 8, A. D. 1856.

On the 30th day of April, A. D. 1852, the petitioners, by a contract then entered into with the Secretary of the Treasury, acting for and on behalf of the United States, undertook to erect a light-house at each of the following points: Alcatraz island, Point Conception, Battery Point, San Diego, Monterey, Farallones, Humboldt harbor, and Cape Disappointment. Ex. doc., Senate, No. 53, 2d sess. 33d Cong., pp. 12, 18.

The Secretary of the Treasury substituted the French lens for the illuminating apparatus, which the petitioners contracted to furnish; and it was agreed that \$8,561 92 should be deducted therefor from the gross sum to be paid to the petitioners. Same doc., No 53, exhibit C, p. 18.

Under a modification of the original contract, made on the 5th day of August, A. D. 1852, it was agreed that the additional sum of \$7,500 should be paid to the petitioners for certain changes therein mentioned, and that they should be paid at a certain rate therein specified for any increase in thickness of wall which might be directed by the Secretary of the Treasury. Same doc., No. 53, p. 18.

All the materials to be sent from Atlantic ports, except the illuminating apparatus, were shipped and insured, and the bills of lading and policies of insurance were assigned and delivered to the United States. The insurance was at and from the city of Baltimore to San Francisco. Same doc., pp. 66, 70; deposition of Henry A. Didier, p. 33; deposition of William Krebs, p. 35; deposition of William H. Hemmick, p. 38. Afterwards, the Secretary of the Treasury paid the petitioners the sum of thirty-five thousand dollars, agreeably to the provisions of the contract.

In the opinion heretofore delivered by this court, we held, without dissent, that, upon the assignment and delivery of the bill of lading and policies of insurance, and the receipt by the petitioners of the stipulated payment, the materials became the absolute property of the United States. That portion of the contract which bears directly upon this point is as follows: "And it is further agreed between the parties to this contract, that in consideration of the advances of money to be made by the parties of the first part for the illuminating apparatus and other materials for the said several light-houses, to be sent from Atlantic ports, that as soon as the said illuminating apparatus, lantern fixtures, fog-signals, oil-vessels, and tin, are shipped and insured, and the policy of insurance is assigned and delivered, accompanied by a duplicate of the bill of lading, to the said party of the second part, and upon the execution and delivery of a penal bond in the sum of seventy-five thousand dollars, with security to the satisfaction and approval of the said party of the second part, conditioned for the faithful execution of this contract on the part of the said parties of the first part, he, the said party of the second part, will thereupon pay and advance to the said parties of the first part, or their order, the sum of thirty-five thousand dollars."

It is supposed that the effect of the assignment and delivery of the bill of lading and policies of insurance was merely to transfer the materials to the United States by way of mortgage, or as a collateral security for the thirty-five thousand dollars. The contract certainly does not, in terms, declare that such was the intention of the parties; and what there is in the language of the contract from which such an intention can be justly inferred we have never been able to discover. There was no contingency then in the contemplation of the parties, upon the happening of which the thirty-five thousand dollars were to be repaid to the United States; and the contract plainly provides that, after the assignment and delivery of the bill of lading and policies of insurance to the United States, the materials were never again to return to the possession of the petitioners, except at the places where they were to be used, and then only for the special purpose of being used in the construction of the light-houses. The transportation of the materials from San Francisco to the several places where they were to be used was undertaken by the United States, and no provision was made in regard to the loss of them during their transportation; and such loss does not seem to have entered into the contemplation of the parties. For all the purposes, therefore, then contemplated by the parties, an absolute transfer of the materials to the United States would have been as effectual as a transfer of them

by way of collateral security. The only security which there is any good reason for saying was even asked for by the United States, was the penal bond mentioned in the contract. It seems to us, therefore, that there is nothing, either in the language of this contract, or in its character, from which it can justly be inferred that the assignment and delivery of the bill of lading and policies of insurance was intended to operate merely as collateral security.

We showed, in our former opinion, that an assignment and delivery of the bill of lading and policies of insurance was the appropriate method of transferring the materials to the United States in absolute property. If one merchant, after having shipped goods, assign and deliver the bill of lading and policy of insurance for a valuable consideration to another, he thereby transfers to him the property in the goods themselves; and, if this be the whole transaction, the transfer is absolute, for the reason that every transfer for a valuable consideration is *prima facie* absolute. To render it conditional, or by way of pledge, or of mortgage, something else must appear besides the mere assignment—the condition must be shown. Now, here nothing is mentioned to indicate an intention to make a conditional transfer, or one by way of pledge, or of mortgage. On the contrary, inasmuch as one security is in terms provided for, the just inference is that no other was contemplated by the parties. *Expressio unius, est exclusio alterius*. And, moreover, to hold that the high public functionary, with whom this contract was made, intended to provide for a transfer by way of security, and yet used the very terms which he ought to have employed if the transfer had been intended to be absolute, would be to ascribe to him a degree of carelessness and looseness, if not of bad faith, which surely ought not to be lightly imputed to him. A public officer may stand, if in such cases he is judged by his words fairly and justly interpreted, but the purest and best and wisest must fall if their words are disregarded, and mere conjecture is substituted in the place of construction.

But again, if a mere security was intended, why was not the advance made before the materials were bought? It would, doubtless, have been more convenient to the petitioners, and greatly to their advantage, to have received the thirty-five thousand dollars before they went into the market to buy materials. We cannot say, with absolute certainty, why this was not done. We know, however, that it could not have been lawfully done. It is forbidden by the express words of the act of January 31, A. D. 1823, (3 Stat. at Large, 723,) referred to in our former opinion. And here we find abundant reason why it was not done, and further inquiry upon this point is therefore unnecessary. The very structure of the contract shows that the parties had that statute in contemplation, and hence the only just and fair conclusion is, that it was made with reference to it. We cannot suppose that the head of the Treasury Department was ignorant of that law. But, as we have shown, in our former opinion, it would have been as much a violation of it to have made an *advance* of money *after* as *before* the assignment and delivery of the bill of lading and policies of insurance. A *payment* for articles delivered for the *use* of the United States is allowed, but this necessarily implies that the articles thus

delivered become, upon the making of the payment, the property of the United States. See our reasoning upon this subject in our former opinion. If there could be reasonable doubt upon this point, the benignity, as well as the justice of the principle on which that opinion, in this respect, is in part founded, would make it our imperative duty to adopt the construction which is consistent with lawful conduct and lawful intention. If a different principle should prevail, its harshness would shock every sentiment of justice and of right, and render a public office a position to be shunned, because it would environ it with dangers which no prudent man would ever encounter.

It is urged, however, that the petitioners themselves speak of the materials as having been held by the United States as "security," and as "collateral security." Senate Ex. Doc. No. 53, 33d Cong., 2d Sess., pp. 158, 159. But, in another place, they say: "All the property of your memorialists on board of the said barque Oriole had been some time before, transferred to the government as security for certain advances made by the government. It was, therefore, *in point of fact*, the property of the United States, and was at the risk of the government at the time of its loss." Same Doc., p. 11. In their petition, filed in this court, they say: "The said goods were *the property of the government*; and if not, were, at the time of the loss, in the exclusive possession and charge of a government officer, * * * and they were, therefore, at the risk of the government, under all the circumstances." Now, if what the petitioners have said on this subject is to furnish the rule for the construction of the contract, on which of these statements are we to rely? According to the first, they were held by the United States as security; but according to the others, they were the property of the United States. Doubtless, the truth is, the memorials and petitions were drawn up by counsel, and the portions of them just referred to are obviously mere arguments, for which the petitioners cannot be regarded as in any way responsible. And, moreover, the contract must speak for itself; and an erroneous construction put upon it by the parties to their prejudice is certainly not conclusive upon them. The question is not, what is the opinion of the parties as to the legal effect of the contract? If it were, then they must be taken altogether, for it would be obviously unjust to garble them. But the question which we must consider is, what is the legal effect of the contract; and in doing this we must look to the contract itself.

It is also urged that the witnesses testify that the transfer of the materials to the United States was by way of security. It seems to us that the question here is one of construction, and that parol testimony is not admissible to explain the contract. But, even if it could be received for that purpose, the testimony in this case is wholly insufficient to show that the transfer was by way of security. The witness, Hemmick, says: "The building materials were shipped and insured, the policies of insurance assigned to the United States; * * * the entire cargo being thus *secured* to the United States to cover advances." It will be observed that the attention of the witness was not drawn to the distinction between a transfer by way of security and an absolute transfer; and that the latter would as effectually secure

the cargo to the United States, to cover advances, as the former. The whole object of the act of 1823 itself was to *secure* the interests of the United States; but that object is attained by making materials paid for, the property of the United States. See our former opinion. Surely the testimony of this witness cannot be sufficient to alter the plain words of the contract.

The witness, Hodge, testifies that "such advance was made. * * * As security to the United States, all these materials * * * were transferred to the United States by invoice and bill of lading; the whole cargo going consigned to the collector at San Francisco, to be held by him for account of the United States, and only to be delivered by him to the contractors at the sites of the respective light-houses, and to be used in their construction." The attention of this witness was not called to the distinction between a transfer by way of security and an absolute transfer; nor was the contract submitted to him. He spoke from his recollection of the transaction. Whether he meant the kind of security which it was the design of the act of 1823 to provide for the United States, or a mere collateral security, he was not asked to state. His mind was not drawn to that subject. There can be no just ground for saying that his testimony can be relied on to show that the contract is different from what it purports to be. On the contrary, the testimony of both these witnesses, properly understood, is, we think, entirely consistent with the terms of the contract, and with that construction of it which we have adopted. We adhere to the opinion which we have heretofore expressed upon this subject, and for the reasons therein set forth.

The case of the United States *vs.* Robert Tillotson, 1 Paine's R., 332, is not an authority opposed to our views. What is said in that case is a mere *obiter dictum*, and in no way affected the questions actually involved. That case, too, was decided before the act of 1823 was passed. There can be no necessity, therefore, for us to take any further notice of it.

Believing, as we do, that the materials were the property of the United States, we have not discussed the question as to their liability for their loss, if the materials were in their possession merely by way of collateral security. It seems to us, however, that the result would be the same even if the materials were not the property of the United States at the time of their loss. They were in no sense mere carriers for the petitioners. There were certain light-houses to be built for them. A part of the work was to be done by them and the rest by the petitioners, both respectively undertaking absolutely and unconditionally to do their several parts. The delivery of the materials at the places where they were to be used was undertaken by the United States. For the performance of this part of the work their obligation, under the contract, was as absolute and unconditional as that of the petitioners, upon its being done, to use the materials in the construction of the light-houses. If they "had chosen to except any loss of any kind, it should have been introduced into the contract by way of exception." *Brecknock vs. Pritchard*, 6 T. R., 750. See our former opinion.

The vessel arrived at San Francisco on the 28th day of January,

A. D. 1853. Senate Ex. Doc. No. 53, 2d session 33d Cong., p. 27. William J. Timanus "arrived in California" on the 17th day of December, A. D. 1852, and commenced his labors on the light-houses at Alcatraz island and Battery Point, and they were nearly completed when the vessel arrived at San Francisco. Deposition of Timanus, answer to 9th int., and answer to 10th int., pp. 14, 15.

On the 8th day of February, A. D. 1853, the petitioners entered into a charter-party with Beverly Sanders, collector of the port of San Francisco. It is set forth at length in the Senate Doc. No. 53, p. 20, and in the opinion of this court, heretofore delivered, its principal features are mentioned.

The petitioners completed the light-houses at Alcatraz island, Battery Point, Monterey, and Farallones island. Afterwards, about the 26th or 27th day of August, A. D. 1853, they sailed in their vessel from San Francisco for Cape Disappointment. In attempting to enter the Columbia river, the vessel struck on the outer bar, and, together with all her cargo, was lost. She had on board at that time the materials for the four remaining light-houses, an agent of the government, and artisans and operatives to erect the light-houses. All the persons on board were saved.

In consequence of the wreck of the vessel, the petitioners were obliged to pay, and did pay to the men employed to build the light-house at Cape Disappointment, for wages, board, and passage back to San Francisco, \$5,811 54. This was an entire loss to the petitioners.

The materials which were shipped at Baltimore for San Francisco, and lost in the vessel, cost the petitioners, according to the estimate made by William J. Timanus, in December, A. D. 1854, the sum of \$10,558. He makes the same estimate in his deposition on file in this case. See answer to the 23d interrogatory, p. 20.

The wreck of the vessel was occasioned by the act of God. She was under the command of a skilful and experienced pilot. Enoch Moore thinks that the wreck was caused by the pilot's missing the "slew" or channel, "by probably a few feet, the tide having set the vessel too much to the south, and the wind not being sufficient to resist the tide." Moore's deposition, answer to the 14 interrogatory, p. 8. William J. Timanus, in his deposition, says: "The pilot being on board, we proceeded in company with five other vessels, they being ahead. When we arrived near the bar he (the pilot) said he was going to take the vessel in through the middle channel; the pilot also told witness that he was fearful that they would get on the bar too late; the five vessels went over safely. This vessel (the Oriole) was said to draw more water than either of the other five vessels, and when she got on the bar, he (the pilot) said the vessel had met the ebb-tide, and he said there was not sufficient wind to stem the said tide; the current drove her in shallow water, when she struck, and then drifted among the breakers. After striking the third time, the pilot declared the vessel lost. All hands on board then provided themselves with the means of escape, the vessel then filling with water. Witness escaped in a surf-boat; all hands were saved, but everything on board was lost, with the exception of a small trunk, containing two thousand dollars, the same being thrown

in the boat in which witness was, but by whom thrown witness cannot say. They were exposed in the open boats for seventeen hours, without either food or water, having no time before leaving the vessel to provide either. From the time the pilot came on board he had the whole command of the vessel." See Timanus's deposition, answer to 14th interrogatory, p. 16.

The wreck occurred on the 19th day of September, A. D. 1853. See Senate Ex. Doc. No. 53, p. 57, Samuel M. Lawder's affidavit.

After the loss of the Oriole, the petitioners built the light-houses at Cape Disappointment, Humboldt bay, Point Conception, and Point Loma, with materials furnished and carried to those points, respectively, by themselves.

The charter-party was disapproved by the Secretary of the Treasury, and Mr. Hammond, the collector of San Francisco, and successor of Mr. Sanders, who entered into the charter-party, in behalf of the United States, was instructed accordingly. But Mr. Hammond, in a letter addressed to the Secretary of the Treasury, dated July 28, A. D. 1853, stated as follows: "I am induced to report, without hesitation, to the department, that the arrangement made by my predecessor is, in my judgment, a wise and economical one, and I shall continue it until further instructions from the department." It was continued until the loss of the Oriole, on the 17th day of September, A. D. 1853, and the Treasury Department has paid the petitioners for the whole period that the charter was in operation at the rate therein stipulated. We are of the opinion that under the circumstances of this case, this charter-party furnishes the best and fairest standard by which to estimate the amount which ought to be paid to the petitioners for the transportation of materials to all the light-houses. It has been approved by two collectors of the customs at San Francisco, sanctioned afterwards by the Secretary of the Treasury, and sustained by the Committee of Claims in the Senate. Doc. No. 53, p. 109. We think it entitled to much higher consideration than mere estimates made by witnesses.

The agent of the petitioners arrived at San Francisco on the 17th day of December, A. D. 1852, and commenced his labors on the light-houses at Alcatraz island and Battery Point. We do not suppose that he could have commenced on the very day of his arrival. At most, he could not have been engaged in the transportation of materials more than one month and twenty days before the date of the charter-party. Allowing the petitioners compensation for transporting materials to Alcatraz island and Battery Point for this period, at the rate fixed in the charter-party, they will be entitled therefor to the sum of \$5,000.

The "Oriole" was lost on the 17th day of September, A. D. 1853. A considerable period of time must have elapsed before the petitioners could have been prepared to recommence the transportation of materials for the construction of the four light-houses, which they afterwards built. They were obliged to return to San Francisco, and make preparations to go on with the work. Timanus was in San Francisco in October, A. D. 1853; and we infer from his testimony (see Timanus's deposition, answer to 33d interrogatory, p. 27) that

the transportation did not recommence earlier than January, A. D. 1854. They were completed on the 15th day of July, A. D. 1854. We do not feel ourselves authorized by the evidence to estimate the time occupied in this transportation at more than six months. Thus estimating it, the petitioners are entitled therefor to the sum of eighteen thousand dollars.

Kelly, one of the petitioners, and Timanus their agent, were detained in California seventy-four days, (sixty-four days excluding Sundays,) waiting for an agent of the United States to receive the light-houses. See Timanus's deposition, answer to 20th interrogatory, p. 18; *ibid.*, answer to 18th and 19th interrogatories, p. 19; *ibid.*, answer to 25th and 26th interrogatories, p. 21; Moore's deposition, answer to 20th interrogatory, p. 10. But it does not seem to us that it was necessary that more than one of them should have remained for that purpose. The evidence shows that his services were worth fifteen dollars a day. The petitioners, we think, are entitled therefor to \$960.

For reasons stated in our former opinion, we think that the materials carried from Baltimore and lost in the "Oriole" were the property of the United States. According to the original contract, the payment of \$35,000 was to be made for all the materials, including the illuminating apparatus. Those actually shipped cost the petitioners \$23,085. Doc. No. 53, p. 70. There was deducted for the illuminating apparatus \$8,561 92. *Ibid.*, pp. 18, 25. These two sums amount to \$31,646 92. The contract to pay for materials, which would cost this sum, and for their shipment and insurance, the sum of \$35,000 was certainly not unreasonable. And, moreover, if the price agreed upon for the erection of the light-houses was fair and just, any erroneous estimate which might have been made of the value of the materials was necessarily to be corrected in the final settlement, when the \$35,000 were to be accounted for in the manner provided in the original contract. It is true, that, by the terms of the contract, if the French lens should be determined upon by the United States, the payment was nevertheless to be the same; but the ultimate result was not, and could not, be affected by it. We do not find in these circumstances, or in any others which appear in this case, evidence of a fraudulent design in any person. The original contract does not limit any period within which the United States should elect to substitute the French lens for the apparatus to be furnished by the petitioners. They might have done so after the petitioners had actually procured the illuminating apparatus which they contracted to furnish. And, moreover, it is not entirely clear that the petitioners were entitled to the payment of the whole sum of \$35,000, if the illuminating apparatus was not shipped by them. It was to be made "for the illuminating and other materials." The result, we think, has shown that the disadvantage was altogether on the side of the petitioners.

The settlement which has heretofore taken place between the United States and the petitioners (Doc. No. 53, pp. 23, 25) seems to have been based upon the assumption that this transaction was entirely fair and *bona fide*. We have found no reason to think otherwise.

But whilst the United States necessarily became the owners of the materials, they were at the same time entitled to have the payment of \$35,000 accounted for in the manner prescribed by the original contract. After the loss of the Oriole, the petitioners may not have been bound to proceed with the light-houses then to be built, unless the United States had furnished the materials. But be this as it may, the United States did not furnish them. This was done by the petitioners, and they are entitled to be paid therefor what they were reasonably worth. They were reasonably worth what the petitioners paid for them, and a fair per-centage thereon to compensate them for their trouble and outlay of money. But there is no evidence on these points in this case. In the absence of such evidence, we can allow the petitioners the cost of the articles on board of the Oriole at the time of her loss. This was \$10,558. See Timanus's deposition, answer to 23d interrogatory, p. 20.

We are also of the opinion, that the United States are liable for the actual damages sustained by the petitioners by the failure of the United States to deliver the materials at Cape Disappointment. See our former opinion. These are shown to have been \$5,811 54.

If these views be correct, then the United States are indebted to the petitioners as follows :

For transportation to Alcatraz island and Battery Point.....	\$5,000 00	
Deduct the amount paid therefor by the Secretary of the Treasury, \$450 + 1,140.....	1,590 00	
		\$3,410 00
For transportation to Cape Disappointment, Humboldt bay, Point Loma, and Point Conception	18,000 00	
Deduct amount paid by the Secretary of the Treasury, \$1,238 + \$1,138 + \$3,923 + \$1,250.....	7,549 00	
		10,451 00
For detention of Timanus after the light-houses were completed, 74 — 10 Sabbaths = 64 days, at \$15 a day.....	960 00	
For goods lost in the "Oriole".....	10,558 00	
For damages occasioned by the failure to deliver the materials at Cape Disappointment.....	5,811 54	
		<u>31,190 54</u>

We shall report to Congress a bill in favor of the petitioners, for the sum of \$31,190 54.

GIBBONS & KELLY vs. THE UNITED STATES.

Judge BLACKFORD's dissenting opinion :

I dissent from that part of the judgment of the court in this case which allows the claimants the sum of \$10,558 for the goods lost by

the shipwreck on the Oregon coast, and from that part which decides that the claimants are entitled to be paid for the materials which they can prove to have been furnished by them for some of the light-houses after the shipwreck.

The foundation of the claim is a written agreement, dated April 30th, 1852, respecting the building of certain light-houses on the Pacific coast.

That agreement states, among other things, "that in consideration of the advances of money to be made by the parties of the first part, (Gibbons & Kelly,) for the illuminating apparatus and other materials for the said several light-houses to be sent from Atlantic ports, as soon as the said illuminating apparatus, lantern fixtures, fog-signals, oil vessels, and tin, are shipped and insured, and the policy of insurance is assigned and delivered, accompanied by a duplicate of the bill of lading, to the said party of the second part, (the Secretary of the Treasury,) and upon the execution and delivery of a penal bond in the sum of \$75,000, with security to the satisfaction and approval of the said party of the second part, conditioned for the faithful execution of this contract on the part of the said parties of the first part, he, the said party of the second part, will thereupon pay and advance to the said parties of the first part, or their order, the sum of \$35,000."

It was further agreed, "that in case a revenue cutter, or other public vessel of the United States, should be proceeding to the Pacific coast at or about the time said above-named illuminating apparatus, lantern fixtures, fog-signals, oil-vessels, and tin, together with the entire wood-work of said several light-houses, except the joists and rafters, are ready for shipment, the same will be taken on board of said vessel and delivered to the collector of San Francisco, free of charge to the said parties of the first part; and in the event that no such vessel is sent as aforesaid, that then, and in that case, the said party of the second part will be bound to otherwise transport the said articles by other vessel or vessels, free of freight, to San Francisco, provided that the entire freight on the wood-work does not exceed \$2,500, exclusive of the freight on the other articles; and provided further, that in case the said articles are transported by the parties of the first part, the party of the second part will pay therefor, upon the production to him of the evidences of such shipment, as hereinbefore mentioned, the usual and customary cost of the freight thereof."

It was further agreed, "that the said articles so to be shipped as aforesaid are not to be delivered to the said parties of the first part at San Francisco, but the same are to remain in the possession of the collector until delivered at the several points where the same are to be used, and to which several places they are to be transported under the authority of said collector, when required by the said parties of the first part, in a revenue cutter of the United States, or other vessel; the said parties of the first part being also required to send therewith, in said cutter, a competent artisan and a sufficient number of workmen to place said apparatus and fixtures, without unnecessary delay, in the several towers erected for their reception. It is to be understood, however, that in case the said parties of the first part shall prefer to ship the said illuminating apparatus, lantern-fixtures, fog-

signals, wood-work, and other accessories, or any part thereof, directly to the several points, and place the same in the several structures, without going to San Francisco, they, the said parties of the first part, shall have the right and privilege to do so."

The agreement also says: "It is further understood that the advance payment of \$35,000, herein provided for, is to be deducted from the specific payments upon each light-house, as the same are respectively finished, in a *pro rata* proportion; that is to say, \$3,860 of the said advance payment are to be deducted from the price of each of the several light-houses in California, and the sum of \$7,980 from the price of that in Oregon." See this contract in Executive Document of the Senate No. 53, 33d Congress, 2d session, pp. 12 to 16.

One of the claimants' witnesses, William H. Hemmick, who was the clerk and disbursing agent of the claimants, says, among other things, "that for the speedy commencement of their contract, (the contract above mentioned,) and to avoid the delays consequent upon charters of vessels, the contractors purchased a first-class Baltimore built barque, called the 'Oriole,' of some three hundred tons, and caused such additions and alterations to be made as would make her suitable for the safe and speedy transportation of the required materials from Baltimore to San Francisco. The building materials were shipped and insured, the policies of insurance assigned to the United States the 5th day of August, 1852, the entire cargo being thus secured to the United States to cover advances." "The entire cargo thus assigned was delivered to the collector of the port of San Francisco, California, on the arrival of the barque Oriole." The same witness, in another deposition, gives a list of the articles which he shipped as aforesaid to California, and states that their value was \$23,085. He also states that the bills of lading were assigned to the government. See said document, No. 53, pp. 58, 59, and printed depositions, pp. 37, 38.

Another witness of the claimants, William L. Hodge, states, that the said contract between the claimants and the United States was made by him, whilst he was Assistant Secretary of the Treasury. In his deposition, he says: "The department, expecting to send one or more revenue cutters to the Pacific, agreed to transport in them, free of expense to the contractors, any articles or materials required for said light-houses, and which they might wish to send. In default of so transporting them by a public vessel, the United States were to pay the freight on the same by any private vessel. As the contractors intended to send a large quantity of the wood-work, and knowing the high rate of freights to that quarter, I feared that on the great bulk of such wood-work it would amount to a heavy sum. I therefore insisted upon a limit upon the amount of freight of such wood-work, and, after a long discussion, and with great reluctance on the part of the contractors, they agreed to a maximum limit of \$2,500 for the freight on all the timber, joists, and wood-work, and with customary freight on the other articles and materials, if they did not go by a public vessel. As the United States did not send any cutter at the time, all the wood-work, articles, and materials were shipped by a private vessel; the freight on all which, including the \$2,500 allowed

for the wood-work, amounted to upwards of \$5,000, which was paid to the contractors by the treasury on account of the United States."

The following interrogatory was put to this witness: "Do you know anything relative to the advance of money by the government to the claimants for the purchase of the said materials? If yea, please state the amount of such advance, the reason why it was made, whether any security was given by the claimants to the United States for such advance by the transfer of the materials, bill of lading, policies of insurance, or otherwise, and all the circumstances attending the same."

"*Answer.* Such advance was made to the contractors to the extent (if my recollection serves me) of about \$30,000, to enable them to pay for the said materials; and I believe they were entitled to such advance by a stipulation in the contract. As security to the United States, all these materials, including the entire cargo on board the vessel in which they were shipped, were transferred to the United States by invoice and bill of lading, the whole cargo going consigned to the collector at San Francisco, to be held by him for account of the United States, and only to be delivered by him to the contractors at the sites of the respective light-houses, and to be used in their construction. All these articles were fully insured; and as an additional security to the United States, in case of their loss on the voyage, the policies of insurance were transferred to the United States by endorsement of Gibbons & Kelly, I think to Thomas Corwin, Secretary of the Treasury, or to his successor in office, and the loss, if any, under the said policies, was made payable to him. I distinctly recollect receiving all the above documents, and writing myself the endorsement of transfer on the policies, which transfer was duly executed by Gibbons & Kelly. These invoices, bills of lading, and policies of insurance, were in the Treasury Department up to the period of my resignation as Assistant Secretary of the Treasury, in March, 1853, which, however, I understand, have been mislaid, and cannot be found." See printed depositions, pp. 40 to 43.

The claimants, Gibbons & Kelly, in their memorial to the Committee of Claims of the Senate, use the following language: "II. Having examined the provisions of the contract on this point, let us now look at the facts. We, finding that no government vessel or revenue cutter was proceeding to San Francisco, or either of the points named, instead of chartering a vessel to carry out the men and materials, preferred purchasing the barque Oriole, and undertook the transportation of the materials (illuminating apparatus and wood-work) to San Francisco, and upon arriving there offered to deliver up to the collector at that port the articles so shipped, so that the same might remain in his possession, and *might be transported under the authority of the said collector, in a revenue cutter or other vessel, to the several points where the same were to be used.*

"The collector at San Francisco, looking to the difficulty of loading and unloading the barque, to the great cost of storing the goods at San Francisco, and to the risk of such a disposition of the materials, preferred to charter the barque Oriole from the contractors, and to convert it into a store-ship, and, as needed, into a transport vessel. The government took charge of the barque, placed an officer appointed by

the collector (Captain Moore) on board, and was as completely the master and charterer of the vessel as if it had been a rented warehouse on shore. The former collector, Mr. B. C. Sanders, effected the charter, and his successor, Mr. Hammond, although the department at Washington declined, at first, to ratify the charter, informed the department that it was the best, most advantageous, and cheapest arrangement that he could make."

The said memorial of the claimants also contains the following paragraph:

"5th. The only remaining inquiry is as to the loss by the barque Oriole. Here again the board [Light-house Board] is *entirely at fault with regard to the facts*. The collector at San Francisco did not 'relinquish his control and possession to the contractors at San Francisco.' The property was *not* lost while in the possession and at the unrestricted disposal of the contractors. On the contrary, the barque Oriole was the government barque, chartered by its officers, and bore the same relation to these contractors as if the government had hired the barque from any other parties. In addition to which, the materials on board (all of which were held as security by the government) were under the supervision and control and in the possession of Captain Moore, the government agent on board, who was only authorized to deliver to us as *we might need them*. Are not parties who have the custody of collateral securities bound to use due caution and ordinary prudence in taking charge of and preserving those securities? And is the government of the United States, intrusted with the custody of goods as security, with the policy of insurance in its own hands assigned for protection, to carry the collaterals to any part of the world, and then, when lost upon some dangerous coast, to be permitted to say that it is not responsible to the principal for the loss, but that he must supply what their negligence has brought upon him? We do not think that the committee of the Senate will sanction such a doctrine, when they recollect that on board this barque were the stone decks, cut-stone steps and sills, hardware, oils, paints, wood-work, and other materials for *all* the remaining light-houses contracted to be put up, together with the carts, lighters, &c., &c., necessary for doing all the unfinished work. Can it be that, instead of storing the articles for the other lights at San Francisco, the government, preferring to have them on board this vessel, can carry them all over the world?" &c. See this memorial in said document No. 53, pp. 152 to 159.

The petition of the claimants to this court, to a part of which the court refers, contains the following statements:

"And the acting Secretary of the Treasury required your petitioners to assign, and they did assign to the government, by way of indemnity for the advance or pre-payment of the sum of \$35,000 on their said contract, the policies of insurance and bills of lading, &c." Again: "Your petitioners further show that by the express contract of the United States, and requirement of the Secretary of the Treasury, they received into their sole and exclusive possession and control all the articles and materials enumerated in the list aforesaid, and belonging to your petitioners. That the same were so received by the United States as aforesaid, to secure the due performance of the contract by your petitioners; and in consideration of such delivery into the posses-

sion of the United States, and of the assignment of the policy of insurance and bills of lading therefor, the United States undertook and stipulated to transport said articles," &c.

It appears to me plain, from said agreement of April 30, 1852, from the testimony aforesaid of the claimants' witnesses, Hemmick and Hodge, and from the language of the claimants in their said memorial and petition, that the goods lost in the "Oriole" were, at the time of the loss, the property of the claimants. They were originally owned by the claimants, and were transferred by them to the United States as *collateral security* for the advance of \$35,000 to them by the Secretary on the contract for the building of the light-houses. That advance and the security for it were required by the contract, and the evidence shows that, in that respect, the contract was complied with. What says Mr. Hodge, one of the claimants' witnesses, who, as Assistant Secretary of the Treasury, made the contract with the claimants, and wrote the transfer of the policies? He was asked if he knew anything relative to the advance of money, &c. He answered as follows: "Such advance was made to the contractors to the extent (if my recollection serves me) of about \$30,000, to enable them to pay for the said materials; and I believe they were entitled to such advance by a stipulation in the contract. As security to the United States, all these materials, including the entire cargo on board the vessel in which they were shipped, were transferred to the United States," &c. What say the claimants themselves in their memorial above referred to? They use the following language: "In addition to which, the materials on board (all of which were held as security by the government,) were under the supervision," &c. Again, in the same memorial, the claimants, in charging the government with not taking proper care of said materials, ask the following questions: "Are not parties who have the custody of collateral securities bound to use due caution and ordinary prudence in taking charge and preserving those securities? And is the government of the United States, intrusted with the custody of goods as security, with the policy of insurance in its own hands, assigned for protection, to carry the collaterals to any part of the world," &c.? What say the claimants in their petition to this court, (the facts stated in which one of the claimants swears to be true to the best of his knowledge and belief?) They say that "they did assign to the government, by way of indemnity for the advance or prepayment of the sum of \$35,000 on their contract, the policies of insurance," &c. * * * * *

"That by the express contract of the United States, and the requirement of the Secretary of the Treasury, they received into their sole and exclusive possession and control all the articles and materials enumerated in the list aforesaid, and belonging to the petitioners. That the same were so received by the United States, as aforesaid, to secure the due performance of the contract by your petitioners," &c.

The foregoing evidence and statements of the claimants satisfy me that they never sold, nor intended to sell, said goods to the government; but that they only transferred the goods to the government as *collateral security* for the money advanced on the contract.

But it is said that the act of Congress of January the 31st, 1823, Rep. C. C. 29—6

(3 Stat. at Large, 723,) prohibited said advance payment and the taking of the goods into possession as collateral security for the advance. All that needs be said on that subject is this: If the transaction was legal, the goods continued to be the property of the claimants; the United States having a lien on the goods for the advance payment. If the transaction was illegal, it was void, and the goods continued to be, as they previously were, the property of the claimants. So that, whether the transaction was legal or not, it did not change the ownership of the goods. The point being settled that the absolute property in the goods in question was always in the claimants, from the time they left Baltimore until they were lost by shipwreck on the Oregon coast, there is no difficulty in the question as to who must bear the loss.

After the arrival of the goods at San Francisco, it became the duty of the collector of customs there, by virtue of the agreement of the 30th of April, 1852, to take ordinary care of the goods, and, on request of the claimants, to ship them, or such part of them as circumstances required, in a revenue cutter or other vessel, to the places at which they were to be used. The collector accordingly entered into the following charter-party with the claimants:

"This charter-party, made and concluded upon in the city of San Francisco, the 8th of February, 1853, between Francis X. Kelly and Francis A. Gibbons, owners of the barque 'Oriole,' of the city of Baltimore, of the burden of two hundred and twenty-three tons, or thereabouts, register measurement, now lying in the harbor of San Francisco, in the State of California, of the first part, and Beverly C. Sanders, collector of the port of San Francisco, acting on behalf of the government of the United States, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, do covenant and agree on the freighting and chartering of the said vessel to the said party of the second part, for the conveyance of materials for light-houses to Monterey, Point Conception, San Diego, the Farallones, Humboldt bay, the mouth of Columbia river, and such other points as may be designated by the said party of the second part, or by the duly authorized agent of the United States government, on the terms following, that is to say:

"*First.* The parties of the first part do engage that the said vessel, in and during the time she shall be thus employed, shall be kept tight, staunch, well-fitted, tackled, and provided with every requisite, and with men and provisions necessary for such service.

"*Second.* The said parties of the first part do engage further to convey and provision such agents of the government, and such artisans and operatives as may be necessary to be transported with the materials, for the purpose of erecting the light-houses to be constructed.

"*Third.* The said parties of the first part do engage further to take and receive on board said vessel, during the continuance of this charter, all such materials as may be shipped by the party of the second part, or the duly authorized agents of the United States government.

"*Fourth.* The said parties of the first part do engage further to

land and deliver the materials, operatives, and artisans aforesaid, at the points which may be selected as the sites for the light-houses by the duly authorized agents of the United States government.

"*Fifth.* The said parties of the first part do engage further that this charter is to continue until the whole of the materials are transported to the sites where the light-houses are to be erected, and is to terminate as soon as all the materials are delivered in pursuance of its requirements: Provided, however, that this charter shall be approved by the Secretary of the Treasury; and if it shall not be approved by the said Secretary, then it shall cease and terminate on the day when notice of the disapproval of the said Secretary shall be received by the said parties of the first part, or either of them, or on such day as the said Secretary shall designate after the receipt of the notice by the parties of the first part.

"And the said party of the second part, on behalf of the United States government, for and in consideration of the covenants and agreements to be kept and performed by the said parties of the first part, does covenant and agree with the said parties of the first part to charter and hire the said vessel as aforesaid, and to pay to the said parties of the first part, or their agents, for the charter or freight of the said vessel during the time the said vessel may be engaged under this charter, the sum of 3,000 dollars for each and every month, payable monthly at the end of each and every month, it being understood and agreed upon that this charter shall commence from the day of the date hereof.

"To the true performance of all and every of the foregoing covenants and agreements, the said parties, each to the other, do hereby bind themselves, their heirs, executors, administrators, and assigns.

"In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

"FRANCIS X. KELLY. [L. S.]

"FRANCIS A. GIBBONS, [L. S.]

"By his attorney, WM. J. TIMANUS.

"In the presence of

"CYRIL V. GREY.

"BEVERLY C. SANDERS, [L. S.]

"Collector."

In August, 1853, the "Oriole" sailed, under said charter-party, from San Francisco, bound to Cape Disappointment; the claimants having undertaken, by the charter-party, *to convey the goods to the designated points, and land and deliver them there.* The vessel was lost by the perils of the sea, at the mouth of the Columbia river; in Oregon, with the materials on board for the four light-houses not then erected. Mr. Moore, in charge of said materials, as agent of the government, was on board of the vessel at the time she was lost. The absolute property of the goods at the time of their loss was, as before said, in the claimants, who had pledged them to the United States as security for the advance payment of \$5,000 dollars.

The question for examination upon the aforesaid facts is, whether

the loss of said light-house materials is to be borne by the United States or by the claimants?

I have already copied into this opinion the whole of the agreement of the 30th of April, 1852, which relates to this question. The substance of that part of the agreement is, that the United States would transport said materials to San Francisco and deliver them to the collector there, free of charge to the claimants, in a revenue cutter or other vessel, or if the claimants transported the articles, the United States would pay the freight; and that the articles should remain in the collector's possession at San Francisco until transported under his authority, when required by the claimants, to the designated points, in a revenue cutter or other vessel. As the goods were carried safely to San Francisco, and were put under the control of the collector, no further notice need be taken of the agreement relative to that part of the case. The contest between the parties arises out of the agreement as to the carriage of the goods from San Francisco. The United States undertook, for a sufficient consideration, to carry the claimants' goods, when required by them, in a revenue cutter or other vessel, from San Francisco to certain other points on the Pacific coast. One of those points was Cape Disappointment, near the mouth of the Columbia river. The United States, as to this affair, are not to be considered as common carriers. There is no pretence that they were common carriers, they not being bound, by law, to carry goods generally. They are to be considered, under said agreement, as private carriers for hire. The consideration for the undertaking to carry the goods is to be found in the execution, by the claimants, of said agreement. A late writer describes the difference between the liability of a common carrier and a private carrier for hire, as follows:

"The difference with respect to the degree of liability between a *private* carrier for hire and a *common* carrier (whose undertaking is always for hire) is, that the latter is bound to deliver the goods intrusted to him against *all events* but the acts of God and the public enemy. The responsibility which is founded merely upon the reward is not incurred when a certain degree of diligence has been used, whereas that which is imposed by the common law upon the common carrier is derived mainly from his public employment, and is not avoided by any quantity of diligence. * * * * *

* * * *Ordinary diligence*, to which a private carrier for hire is bound, is such diligence as every prudent man commonly takes of his own goods, and *ordinary negligence* is therefore the want of such diligence." Angell on Carriers, sec. 67.

Considering the United States, in this case, as private carriers of the claimants' goods for hire, as in my opinion they must be considered, they are not liable to the claimants for the loss of the goods, unless it be proved that the loss occurred from the want of *ordinary diligence* on the part of the government.

Now, there is not the slightest evidence of the want of ordinary diligence by the government in the carrying of the goods from San Francisco. The collector there was the agent of the government for the management of this business. There being no public vessel at the time at San Francisco to carry the goods, the claimants' agent pro-

posed to the collector the chartering of the "Oriole," the claimants' vessel. That proposition was accepted by the collector, and the aforesaid charter-party was accordingly executed. There was surely no want of ordinary diligence on the part of the government in that transaction. The claimants thereby agreed to convey in the "Oriole" the said materials for certain light-houses to, among other places, the mouth of the Columbia river. The claimants also agreed, by the charter-party, that the vessel should be kept tight, staunch, &c.; that they would convey and provision such agents, &c., as might be necessary to be transported with the materials, &c.; that they would receive on board all such materials as might be shipped by the United States, &c.; that they would land and deliver the materials, &c., at the sites for the light-houses, &c. For which service, the United States agreed to pay the claimants \$3,000 a month.

It is difficult to conceive how a more favorable arrangement for the claimants as to the carrying of their goods (which the United States had agreed to carry in a revenue cutter or other vessel) could have been made. No want of ordinary diligence in the matter can possibly be imputed to the United States. They placed the claimants themselves, by the charter-party, under the same liabilities that the United States were, for the carrying of the goods, namely, the liabilities of private carriers for hire.

In August, 1853, the "Oriole" sailed, under said charter-party, with the materials for some of the light-houses on board; but when she arrived near Cape Disappointment, one of the light-house sites, she and all the materials on board were lost by the perils of the sea, without the fault of any person whatever. The consequence of this shipwreck was that the claimants lost their goods, and the United States lost their lien, if they had any, on them, for the advance payment of \$35,000. That being the case, the claimants have no ground for the charge against the United States for the \$10,558, the value of the materials lost by the shipwreck. Neither have the claimants any ground for the charge for the materials, if any, furnished by them after the shipwreck, to supply the place of those which were lost; because they were bound to furnish all the materials for the light-houses, and, of course, when any of the materials were lost, without the fault of the government, the claimants were bound to supply the loss.

I dissent, also, from that part of the judgment of the court which allows the claimants the sum of \$5,811 54 for the failure of the United States to deliver the materials at Cape Disappointment. This sum is allowed by the court as damages which arose to the claimants in consequence of the aforesaid loss of the materials, over and above their value. But if, as I have endeavored to show, those materials belonged to the claimants, and they were bound to bear the loss, it follows, of course, that any subsequent damage suffered by the claimants in consequence of that loss must also be borne by them. The government not being liable for the non-delivery of the materials lost, cannot be liable for any damage which may have ensued to the claimants in consequence of the non-delivery.

WILLIAM NEIL AND OTHERS.

JULY 25, 1856.—Committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

WILLIAM NEIL AND OTHERS *vs.* THE UNITED STATES.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of William Neil and others *vs.* The United States:

1. The petition of the claimant.
2. Documents presented by the claimants, as exhibits in the case transmitted to the Senate.

3. Opinion of the court unfavorable to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this tenth day of July, A. [L. S.] D. 1856.

SAM'L. H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

NEIL, SULLIVANT & TALLMADGE, }
for the use of "The Ohio Stage }
Company," }
VS.
THE UNITED STATES. }

The decision of Postmaster General Johnson, from which we appeal, is based upon the unauthorized assumption that the increased compensation was to be allowed for so expediting the mail as to connect with the morning boats at Cincinnati. No reference or allusion to the boats is contained in the letter of November 6, 1845, proposing the increase of service, nor in the simple, unconditional acceptance of the proposition in Mr. Neil's letter of November 11, 1845.

The contract time for the delivery of the mail at Cincinnati was 6 p. m. ; and the contractors had the permission of the department to convey the mail by railroad from Xenia to Cincinnati without change of time of delivery. At that date, two trains daily connected between Xenia and Cincinnati—the first leaving Xenia at 6 or 7 a. m., and the second at 1 p. m. ; by either train, the mails would reach Cincinnati within contract time, and they were conveyed sometimes by one, sometimes by the other ; so that it frequently happened, that when the mail was too late for the first train, intelligence was received by express or otherwise in this first train, and so in advance of the mail which followed in the second train. Expressly to guard against this result, and for no other purpose, the proposition in the letter of November 6th is made; and as an inducement to contractors, and the more readily to enable them to make the increased speed, the department orders up a second line of coaches from Zanesville to Columbus, under an express provision of the contract, at the rate of \$1,200 per annum.

This second line was put on the road November 13, 1845, and the department duly notified of the fact.

Shortly after this the railroad discontinued its second daily train, and fixed the hour of departure of the only train at 8½ a. m.

This action of the railroad company was entirely beyond the control of the stage company. To be sure, it made it somewhat easier for the latter to deliver the mails at Xenia in good time for a connexion, but the letter and the spirit of the contract of November 6th was complied with when they delivered the mails at Xenia in time for the *first* train, provided the train brought the mails into Cincinnati within the time for delivery fixed by the original contract ; and provided, also, that the contractors gave to the public the benefit of a second daily line of coaches between Zanesville and Columbus. It is admitted that this second line was so run, and it is not denied that the connexion was duly made at Xenia with the *first* train on the railroad, and the mails delivered at Cincinnati within contract time.

On the 8th December, 1845, Mr. Postmaster General Johnson writes to Mr. Neil to know “if there is *any prospect* of having the mails taken on by the morning train from Xenia *time enough* to go out by the morning boat from Cincinnati—the interest of the contractors, as well as the department, requires a connexion between the railroad cars at Cincinnati and the departure of the mail boats from Cincinnati.” Nothing is said or intimated here of the existence of any contract requiring this early delivery at Cincinnati, in time for the morning boats, but a mere inquiry as to the practicability of the thing. And the reply of Mr. Neil is quite conclusive of the same fact. He says, (treating this as a new proposition or suggestion,) “Respecting the delivery of the mail at Cincinnati by 12 noon, one of the contractors will visit Washington in a few days for the purpose of making a permanent arrangement in the premises, which will result to the interest of the department as well as the contractors.”

How can it be believed that this correspondence relates to the identical same thing that only thirty days before had been expressly stipulated and agreed by the written contract of the parties ; or is it not apparent that this correspondence relates to new matters not provided

for by the antecedent contract for the delivery of the mail at Xenia "in time for the first train of cars?"

Neil adds in this same letter, that previous to their coming on to make the new arrangement with the department, the stage company must have negotiations with the railroad company, in order to know what they can do in forwarding the mail to Cincinnati in time for the morning boats.

We are not informed whether the proposed visit of one of the stage company to Washington for the purpose of negotiating a new contract was ever in fact made; but we know that no result was attained from the contents of a letter from the department to the postmaster at Columbus, under date of January 13th, inquiring what was then the prospect of connecting the mails with the morning boat at Cincinnati, and requesting him to have an interview with the stage company on this subject; but giving no intimation to the stage company that they were under any obligation, or that the department considered them as under any obligation, by contract, so to deliver the mails at Cincinnati.

The postmaster at Columbus replies, under date of January 24, 1846, giving the result of his interview with the stage company, as follows: They claimed that they were then delivering the mails at Xenia according to the subsisting agreement with the department, and that they could not agree to expedite the arrival into Cincinnati as proposed without additional compensation. The reasons for this are quite obvious. The increased speed did not depend upon their own exertions, but must be secured by contract with the railroad company, and would involve change in their time-table, which the stage company could not expect to secure without paying them extra compensation.

But it had come to be an object with the department to insure a connexion of the mail with the morning boat at Cincinnati, and, failing to procure that result through the stage company, it turned its attention directly to the railroad company; and on the 17th February, 1846, made a contract with the railroad company to carry the mails from Xenia to Cincinnati, leaving Xenia at 5.50 a. m., and arriving at Cincinnati at 11 a. m.; and curtailed the contract of the stage company to end at Xenia, and required them to arrive at Xenia by 5.30 a. m., in time for this early train.

Now it is admitted that the stage company continuously and promptly run the second line between Zanesville and Columbus, and that they delivered the mail at Xenia at 6 o'clock when the "first train" left at that hour; afterwards, when the hour of departure of the cars was changed to 8 $\frac{1}{2}$, they still delivered in time for the "first train;" and finally, when the hour for departure of the train was controlled by the department, and fixed at 5 $\frac{1}{2}$ 50m. a. m., they accepted that change, which required an earlier arrival at Xenia than had ever before been proposed, and under this last arrangement enabled the department to connect the mail at Cincinnati with the morning boat. On what ground, then, can the department justly refuse to comply with its part of the stipulations in the contract of November 6, 1845? It is attempted to be sustained upon three grounds:

First. By the assumption which I have already shown to be unwarranted, that the contract of November 6 required the delivery of the mails at Cincinnati in time for the morning boat; or, as the proposition is varied in the close of Postmaster General Johnson's opinion on this claim, it was with that view and expectation that the contract of November 6 was made, and that the department would have paid nothing for any increased speed unless it produced that result. I have already shown that the letter of November 6 negatives any such claim or expectation on the part of the department; and, on the contrary, expressly states another and a very cogent reason for requiring the proposed increased speed to Xenia, viz: to prevent the mails being anticipated by private expresses going forward in an earlier train than the one conveying the mail; and had no reference to a delivery at Cincinnati at any fixed and definite earlier hour.

But if there were any doubt of this, will it be pretended here that the Postmaster General may foist into and make part of the contract any secret or reserved hope or expectation of advantage, beyond the terms of the written contract; and claim that the petitioners shall have no part of the stipulated compensation for doing to the full all that they agreed to do, because these services had not secured to him some additional advantage not stipulated for, but which he secretly hoped or expected would follow.

Secondly. It is claimed that the failure of the stage company to apply at their quarterly settlements for this additional compensation, is to be taken as an admission that they did not consider themselves entitled to it. Let us give to this isolated fact the full consequence claimed for it—it would only show that the parties were mistaken in their rights; and they are here now for the very purpose of asserting their rights against all mistakes and errors of judgment—their own as well as those of the department. But this consequence by no means follows from their failure to present the claim. The papers in this case disclose the fact, and the files of the department will attest, that this Ohio Stage Company was one of the largest mail contractors in the United States; perhaps, taking in view the number and length of their various lines, and the amount of compensation paid, they were the very largest. How easy then would it be for the subordinates and officials of this great company to overlook a small allowance for extra service upon one of their great lines—more especially in a case like the present, where the provision for the extra allowance rested in no formal contract, but was evidenced by letters passing between the department and the two principal members of the company.

But, after all, this is but one item of evidence, to be viewed in connexion with many others, which, as herein stated, I submit, outweigh and overrule it.

Thirdly. It is claimed, that in the substitution of Sullivan and Tallmadge as assignees of Neil and Tallmadge, executed March 17, 1846, no provision is made for this second mail, but the matter is left open for the order of the department, exactly as in the original contract, and that this is conclusive against the present claim.

Now, the original contract is the principal thing—the right reserved to the department to order on a second line merely incidental; the ex-

ercise of this power is a matter *in pais*, which never finds its way into the written contract. The assignee of a contractor fills his place, subject to all his liabilities and entitled to all the benefits secured to him by the contract. In this case, Sullivant and Tallmadge, as assignees, succeeded to all the liabilities and rights accruing to their assignors, according to the terms of the contract, and succeeded in like manner to their rights and obligations created by the exercise by the department of its incidental power to order on this second line at the fixed price of \$1,200. They could not, had they chosen to do so, divest themselves of the obligation to run this second line; nor can the department relieve itself from the obligation to pay, unless it can show that the order for the service has been in due form revoked. Has this been done? It is not pretended that it was done prior to the assignment to Sullivant by Neil, or at any subsequent period, by any direct act of the department. But it is claimed that the failure to notice, in the substituted contract, the fact that the order for this second line was outstanding, virtually revoked the order. How so? The order subsisted *under* the original contract without being embraced in it or endorsed upon it; and when the substituted contract was drawn up in the very words of that for which it was substituted, the outstanding order retained its vitality as incidental and subordinate to its principal, whether the original or substituted contract. It was so understood by the contractors, who continued to perform the services which were extra and beyond the requirements of the simple substituted contract; and also by the department, which did not fail to visit the contractors with fines for every failure to comply with this extra service; so that if the assignees had been strangers to the original contract, I hold that the assignment would have carried with it the obligation to perform this extra service at the stipulated compensation.

But the assignment is one of form, and for convenience merely, and in point of fact the same party is before the department throughout the whole term, the stage company being recognised as the real party in interest, doing business in the name of one or more of its individual members; and here a retiring member of the company, in whose name one of its contracts happens to stand, surrenders the contract, and it is reissued in the name of continuing members. In such a case, surely, without some overruling evidence to the contrary, it will be held that the rights and duties of the parties continued unchanged, without any interruption by reason of this formal transfer.

What motive could have operated upon the department to induce it to revoke the order for this extra service? At the date of this substitution the contract had been made with the railroad company to run out a train before six o'clock a. m., and to arrive at Cincinnati in time for the morning boats—as we have seen, a cherished object of the department. Now, in all former negotiations between the parties, the early arrival at Xenia, and the second line between Zanesville and Columbus, had always been coupled together, this second line being spoken of as an aid to enable the stage company to perform the increased speed to Xenia; and when it is remembered that the hour for arrival at Xenia was earlier than when the first increase of speed was provided for, on the 6th November, is it at all reasonable to suppose that

the department meant to put the contractors upon their old terms on one line for both way and through mail, and thus throw impediments in the way of, if not to frustrate entirely, the cherished purpose of such acceleration of stage and railroad speed as to put the mails into Cincinnati in time for the morning boats?

I therefore submit with confidence, that there is nothing in either or all of the objections to impeach our claim for this extra pay, which is founded upon the undeniable facts that the contract for the service is in plain and explicit terms; that these terms were fully and to the letter complied with by the stage company; and that these services have never been compensated by the stipulated pay.

P. B. EWING,
Counsel for Petitioners.

WILLIAM NEIL AND OTHERS *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the court.

The petitioners state the following case:

Before the 6th of November, 1845, they contracted with the Post Office Department to carry the mails from Wheeling, Va., *via* Zanesville, Columbus, and Xenia, to Cincinnati. They were to convey the mails in two lines of coaches, daily, between Wheeling and Zanesville, and in one line only, between Zanesville and Cincinnati. The department reserved a right to order on a second line of coaches between Zanesville and Columbus, at \$1,200 per annum.

Before the 6th November, 1845, the department authorized them to carry the mails from Xenia to Cincinnati, the arrivals to be in contract time. There was both a morning and an afternoon train, but often the stage company were unable to connect with the early train, and forwarded the mails by the afternoon train. Private intelligence was sometimes communicated in advance of the mail.

On the 6th of November, 1845, the First Assistant Postmaster General, after alluding to certain alleged impositions on the public, proposed to the claimants to run through to Xenia in time to connect with the first train of cars, and that the better to enable this to be done, by putting on a double line over the Columbus and Zanesville portion of the route, the department would allow them \$1,200 per annum. This proposition was accepted on the 11th of November, 1845, and on the 11th of November the mail commenced connecting with the first train of cars at Xenia. On that day they put on a second line of coaches between Zanesville and Columbus, and ran it regularly to the 30th of June, 1848. The department took notice of this service, and imposed fines on the failure of its exact performance.

Either from oversight or negligence on the part of their subordinates who had charge of the books of the Ohio Stage Company, or from some unknown cause, the proper claim for this extra service was not presented quarterly during the period of the service, but a demand was made for it about the end of the term, which was considered by the department, and rejected on the 22d of August, 1848. In the year 1850, Mr. Collamer declined to examine the merits of the claim

on the ground that he had not the power to re-examine and overrule a decision of his predecessor.

The claimants are the representatives of the Ohio Stage Company, an unincorporated association, the contract having been taken in the names of one or more of the members, for the sake of convenience, with the knowledge of the department.

They claim pay for extra service in running the second line of coaches between Zanesville and Columbus from the 13th of November, 1845, to the 30th of June, 1848, a period of two years seven months and eighteen days, at the rate of \$1,200 per annum, being the sum of \$3,160.

This case is submitted for our decision upon a statement dated August 22, 1848, prepared by the honorable Cave Johnson while he was Postmaster General. It appears from a letter to Mr. Blair, the solicitor of this court, from Mr. Dundas, the Second Assistant Postmaster General, dated on the 24th of April, 1856, that this paper, prepared by Mr. Johnson, "contains a full statement of the facts in the case in question, and the department has nothing further to add in regard to it."

The facts in the case, material to be considered, as they appear in the statement by Mr. Johnson, are as follows: -

Neil and Tallmadge, being contractors on the route from Wheeling to Cincinnati, in the spring of 1845, were to leave Wheeling with the mail daily at 12 m., and to reach Cincinnati by 6 p. m., the department reserving the right to order a second line to Columbus, at \$1,200 per annum. It was desirable to expedite the line so as to reach Cincinnati by 10 or 11 a. m., in order to connect with the morning boats to Louisville. For this increased service, the contractors ask the additional sum of \$16,000 per annum, which was declined by the department, the Postmaster General having reason to believe that the service could be performed for the sum then paid the contractors, with the addition of \$1,200 per year for a second line over the Columbus and Zanesville portion of the route. Of this the contractors were informed by the First Assistant Postmaster General, on the 1st of November, 1845, who stated to them that the Postmaster General directed "that it be again proposed to you, as it has been heretofore, to run through to Xenia in time to connect with the first train of cars, which, it is understood, leaves at about 6 or 7 a. m., that the better to enable this to be done by putting up a double line over the Zanesville and Columbus portion of the route, he will allow the amount heretofore bid for that service—\$1,200 a year." Neil accepted this proposition by a letter dated on the 10th of November. In the course of the month, the railroad discontinued their second daily trip, and changed the morning departure from 6 a. m. to 8½ a. m., rendering it impossible to make the arrivals at Cincinnati until after the departure of the morning boat. Before this, Neil had written the Postmaster General that the mails were then going on as the department wished. The mails, however, did not go out by the morning boat, and after some correspondence with the contractors, the Postmaster General, on the 14th day of January, 1847, wrote the postmaster at Columbus, requesting him to inquire of Neil and Tallmadge what was the prospect of having the mails delivered at Cincin-

nati in season for the morning boats. On the 24th of January the postmaster replied that there was no ground to hope that a change or increased speed would be made, without a large increase of mail pay. The department, finding that there was no hope of getting the desired expedition to Cincinnati from Neil and Tallmadge, then made a contract with the railroad company. Neil and Tallmadge started the second line of coaches from Zanesville on the 13th day of November, 1845, and ran it during the contract, a period of two years and seven and a half months. Payments were regularly made them on many routes, at the close of each quarter, but no demand was made by them for the \$1,200, until a claim was filed in the year 1848.

Mr. Johnson proceeds to say, that the claim was made upon the ground that the service was performed in compliance with the proposition of the First Assistant Postmaster General, in his letter of the 6th November, 1845; that this letter contained the offer as a part of the proposition to expedite the mails to Cincinnati in time for the morning boat, and upon no other consideration; that the service was of no use to the department, except to enable the contractors to give the desired expedition to Cincinnati, and that nothing would have been paid at any time for the double line, except for that object, as one daily line could take all the mails, as had been done before. He argues that their position, that they were fined for not delivering in schedule time the mails by the second line, and ought, therefore, to be paid for the service, is not sound, because they were bound to deliver the mails at specific times by one line of coaches, and if they chose to divide the mails and send them by two coaches instead of one, so as to give room for passengers in each line, they had the right to do so; but if either line failed to deliver the mails, or any part of them in schedule time, the contractors were justly liable to the department for the failure, and were properly fined.

The material point in the case is, whether the proposal by the department that the claimants should carry the mail by a second line of coaches from Zanesville for the sum of \$1,200 per annum, was an independent proposition, a compliance with which would entitle the claimants to the specific compensation, or whether it was merely a part of the general plan of the department for expediting the mail so that it should reach Cincinnati in season for the morning boat. If it were the former, the claimants would be entitled to the compensation, as they performed the service. If it were the latter, they would not be entitled to compensation, although they performed the service, because they did not transport the mail to Cincinnati in time for the morning boat.

Our opinion is, that the views of Mr. Johnson were correct. Although the department reserved the right to order this second line, it was never done except in connexion with the plan for expediting the mail, and as dependent upon it. It was proposed by the department merely as an inducement to increased expedition. It was substantially an offer to give the contractors \$1,200 per annum for running the second line if they would expedite the mails so as to reach Cincinnati in sufficient season for the morning boat. It was a conditional and not an independent offer, and as the condition was not complied with, the claimants have no cause of action against the United States.

THOMAS PHENIX, JR.

JULY 22, 1856.—Committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

THOMAS PHENIX, JR., vs. THE UNITED STATES.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of Thomas Phenix, jr., vs. the United States:

1. The petition of the claimant.
2. Documents submitted as evidence in the case.
3. Opinion of the court, rejecting the claim on legal grounds only.
By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this tenth day of July, [L. s.] A. D. 1856.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable Judges of the United States Court of Claims:

The petition of Thomas Phenix, jr., respectfully represents:

That during the war with Mexico he was a paymaster's clerk, and served in that capacity with Colonel D. Randall, deputy paymaster general; that the salary of paymaster's clerk is fixed, by the act of July 7, 1838, at \$500 per annum, and each paymaster is ordinarily allowed but one clerk; but, during the war with Mexico, the responsibilities of paymasters being vastly increased, and their duties rendered more difficult in consequence of the employment of volunteer regiments, they were allowed by the Secretary of War to employ more clerks at "a reasonable compensation." Many paymasters availed themselves of this authority, and allowed the assistant clerks so employed \$3 per day, which was the least ordinary pay of clerks in the quartermaster and commissary departments. Regular paymasters' clerks, also, in some cases, as your petitioner is informed and believes,

resigned their appointments, and re-engaged in the service of the same paymasters at the increased amount of pay. Your petitioner did not avail himself of this mode of obtaining higher pay, but continued to perform his duties under the circumstances stated in a certificate of Colonel Randall, which your petitioner here appends, and here recites in full :

NEW ORLEANS, *December 26, 1850.*

I certify that Thomas Phenix, jr., was employed by me as paymaster's clerk during the war with Mexico, and was my only clerk ; that he received, while so employed, only his regular pay of \$500 per annum, and the per diem allowance of 75 cents for subsistence whilst travelling and absent from his station. My disbursements and other duties were very heavy, and would have justified often the employment of one or more additional clerks. This expense was saved to the government in consequence of the efforts made by Mr. Phenix, under the assurance from me that he should be allowed increased compensation for his extraordinary services, if within my power to obtain its allowance, and which, it was understood, had, in many cases, been allowed other paymasters' clerks. I received and paid over large sums on account of military contributions, duties on customs, &c., in Mexico, in which I was also assisted by Mr. Phenix, and for which he received no compensation.

I believe the labors and services to the government of Mr. Phenix were at least equal to any other paymaster's clerk, and I earnestly recommend that he be allowed the highest rate of pay that has been received by any paymaster's clerk in the public service during the war with Mexico.

D. RANDALL,
Deputy Paymaster General.

Your petitioner further shows that the Secretary of War decided that he had no authority to allow the claim, and accordingly application for relief was made to Congress in 1852, where the claim has been since pending, without having met with any final action by either house.

He further shows that no part of the claim was assigned, and that it is one of those cases referred to your honorable court by resolution of the House of Representatives.

Your petitioner therefore prays to be allowed the difference of pay between that which he received and that to which he would have been entitled had he resigned his appointment before entering into this engagement with Colonel Randall.

To pay from 13th May, 1846, to 4th July, 1848, two years	
one month and 22 days, 782 days, at \$3 per day.....	\$2,246 00
Deduct pay for the same period, at \$500 per annum.....	1,073 00
	1,173 00

All of which is respectfully submitted.

THOMAS PHENIX, JR.

To the Hon. HENRY MAY :

SIR: I learn from the Hon. Mr. Vansant, one of our representatives in the House, that there is a disposition on the part of one or two of the honorable members composing the Committee on Military Affairs, to make an adverse report on a claim for my benefit, for services rendered during the Mexican war, (as paymaster's clerk.) This claim was presented to the House in March, 1852, by the Hon. Mr. Faulkner, of Virginia, (now one of the committee referred to,) and favorably acted upon, but it appears during that session the House did not call for any reports, consequently my claim had to be brought before the committee again. Some objections are made by the present committee, as they say I remained in the service on a contingency; that if I had resigned my position as a regular clerk, and engaged with Colonel Randall (my employee, a deputy paymaster general) as temporary clerk, he could then have given me an increase of pay as such. The Secretary of war had authorized the paymasters on duty in Mexico to employ extra clerks at whatever rate they considered reasonable, (whenever the exigencies of the service required it,) and in no case was there an extra clerk employed that he did not receive almost double, and in many cases treble, as much as the regular clerks; moreover, many of the clerks, and particularly those employed by the old regular paymasters, never resigned their clerkships for temporary appointments in order to obtain the extra pay, but as regular clerks, in some instances, were paid as high as three dollars per day, and 75 cents subsistence. Inasmuch as other clerks were receiving this high rate of pay, I repeatedly spoke to Colonel Randall on the subject, and several times requested that I might be allowed to make out my pay accounts at the same rate, and he might pay me what I was actually entitled to by law, and retain the balance, until his accounts were passed by the accounting officers; but being a strictly conscientious and just man, he refused to do this, as there was a regulation of the pay department forbidding any officer from offering any experimental accounts; but he assured me that if the accounts of the other clerks were allowed, I should receive the difference of pay. I was several times offered by other officers double the amount of what I was receiving from Colonel Randall if I would accept a clerkship under them; but inasmuch as I had engaged with Colonel Randall to go for a certain sum, say \$500 per annum, and 75 cents per day subsistence while travelling and absent from a permanent station, I preferred to remain with him, and not desert him at a time when my services were most needed. I did not remain with him with the understanding that I should, for a certainty, receive the increase of pay, nor did I look upon it as a certain thing; but he frequently told me to make myself easy, and that when he returned to Washington he would use his utmost exertions to obtain the increase of pay; and although our duties were equally if not more arduous than many other paymasters, while in the city of Mexico and elsewhere, he repeatedly offered and suggested the necessity of employing one or more additional clerks; I declined, preferring to work late at night, and in several instances, when the army first went to Corpus Christie in 1845, I have worked until reveille, in order that the work

should be properly and satisfactorily done. Independent of my duties as paymaster's clerk, while in the city of Mexico I was called upon to do other duty connected with the settlement of accounts, and moneys collected for customs at Vera Cruz, and taxes levied for various purposes in the city of Mexico, all of which moneys passed through our hands, giving an immense deal of additional labor, exclusive of my regular duties as paymaster's clerk, and for which I have never received one dollar of extra pay. I ask for additional compensation because I think I am justly entitled to it; and had Colonel Randall lived I doubt not he would have used his utmost endeavors to have secured me what he conceived I was so justly entitled to, and had hoped some day to have realized the expectations which he so often held out to me, and to which I think I am justly entitled, as a reward for the faithful discharge of my duty.

All of which is respectfully submitted.

THOMAS PHENIX, JR.

FEBRUARY 28, 1854.

The statement made by Mr. Phenix, that several of the regular clerks received additional compensation, and that he was promised by Colonel Randall that in the event of those accounts passing he should receive a like amount, is correct. Colonel Randall could have put the government to a much greater expense by employing additional clerks, but preferred not to do so, and I have ever considered the claim of Mr. Phenix as just and equitable.

BENJ. F. LARNED,
Acting Paymaster General.

The Committee on Military Affairs, to whom has been referred the petition of Thomas Phenix, jr., late a paymaster's clerk in the army of the United States, have, according to order, had the same under consideration, and submit the following report:

It appears that the petitioner was employed by D. Randall, deputy paymaster general, as paymaster's clerk during the war with Mexico, and that he received while so employed his regular pay of \$500 per annum, and the per diem allowance of seventy-five cents for subsistence while travelling and absent from his station. The disbursements of the deputy paymaster general at New Orleans, and other duties, were heavy, and would have justified often the employment of one or more additional clerks. This expense was saved to the government by the valuable and extraordinary services of the petitioner, rendered by him under an assurance from the deputy paymaster general that he should be allowed an increased compensation for those services, and which increased compensation it was understood had in many cases been allowed other paymasters' clerks. It further appears that large sums of money were received and paid over by the deputy paymaster general, on account of military contributions, duties on

customs &c., in Mexico, in which he was assisted by the petitioner, and for which he received no compensation.

The justice and equity of the claim of the petitioner is conceded by the Paymaster General and by the Secretary of War; and the last named officer admits, that if the increased compensation now asked for had been paid to the petitioner by Colonel Randall, who employed him, it would have been a proper payment, and in strict accordance with law. But he questions his right to make the payment now under the act of the 23d of August, 1842.

The committee hereto append, as part of their report, the letters of Benj. F. Larned, acting paymaster general, and the Hon. Chas. M. Conrad, Secretary of War.

The committee believe the claim to be just, and recommend the payment to the petitioner of \$3 a day during the time he was in the employment of Colonel Randall, as paymaster's clerks, the compensation in many instances allowed such officers, but from which, however, is to be deducted the annual salary of \$500 already received by him.

And they accordingly report the following bill:

A BILL for the relief of Thomas Phenix, jr., late a paymaster's clerk in the service of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War be, and he is hereby authorized to pay to Thomas Phenix, jr., during the time he was acting as paymaster's clerk in the employment of D. Randall, deputy paymaster general, the sum of three dollars a day; but from this compensation is to be deducted the salary of five hundred dollars per annum already received by him.

NEW ORLEANS, December 26, 1850.

I certify that Thomas Phenix, jr., was employed by me as "paymaster's clerk" during the war with Mexico, and was my only clerk; that he received, while so employed, only his regular pay of \$500 per annum, and the per diem allowance of seventy-five cents for subsistence whilst travelling and absent from his station. My disbursements and other duties were very heavy, and would have justified often the employment of one or more additional clerks. This expense was saved to the government in consequence of the efforts made by Mr. Phenix, under the assurance from me that he should be allowed increased compensation for his extraordinary services, if within my power to obtain its allowance, and which, it was understood, had in many cases been allowed other paymasters' clerks. I received and paid over large sums on account of military contributions, duties on customs, &c., in Mexico, in which I was also assisted by Mr. Phenix, and for which he received no compensation.

I believe the labors and services to the government of Mr. Phenix were at least equal to any other paymaster's clerk, and I earnestly re-

commend that he be allowed the highest rate of pay that has been received by any paymaster's clerk in the public service during the war with Mexico.

D. RANDALL,
Deputy Paymaster General.

PAYMASTER GENERAL'S OFFICE,
February 21, 1852.

The facts set forth in the within certificate of the late Col. Randall, in regard to the services of Mr. Phenix, are correct, and I fully concur in the opinion that Mr. Phenix is justly and equitably entitled to the extra compensation asked for; the extra services performed by him would have justified the employment of additional clerks, at a much greater expense than the allowance prayed for.

BENJAMIN F. LARNED,
Acting Paymaster General.

WAR DEPARTMENT,
Washington, February 24, 1852.

SIR: I herewith return the paper given you by Colonel D. Randall, late deputy paymaster general, certifying that he had agreed to allow you, while in his service as paymaster's clerk, during the war with Mexico, as high rate of pay as should be allowed to any other paymaster's clerk at the same time; upon which certificate you claim the difference between \$500 a year, which you received, and \$3 a day, which was paid to certain other clerks.

Had you resigned your regular appointment and annual salary, and been re-engaged by Colonel Randall at \$3 a day, that amount could now be paid you; or had Colonel Randall actually paid you at that rate, the payment could now be sanctioned by this department under the special authority given by an act of March 3, 1849; and in either case I should not hesitate to pass the account. But while you held the appointment of paymaster's clerk, you were within the act of August 23, 1842, which prohibits all those whose pay is fixed by law or regulation to receive any additional pay, extra allowance, or compensation; and the act of 3d March, 1849, which would have authorized the department to allow any extra compensation which might have been actually paid you, under the peculiar circumstances, by the proper disbursing officer, does not, according to the settled construction adopted here, authorize the Secretary of War himself to make or order such payment at this time. For these reasons, however equitable the claim may be, I do not consider that I have authority to allow it.

Very respectfully, your obedient servant,

C. M. CONRAD,
Secretary of War.

THOMAS PHENIX, Jr., Esq.,
Washington City, D. C.

THOMAS PHENIX, JR., vs. THE UNITED STATES.

Chief Justice Gilchrist delivered the opinion of the court.

This case is referred to us by a resolution of the House of Representatives, and is a claim for additional compensation while the claimant was employed as a paymaster's clerk, during the war with Mexico.

The 20th section of the act of July 5, 1838, provides that the salaries of paymasters' clerks shall not exceed five hundred dollars per annum each. (5 Stat., 259.)

The 2d section of the act of August 12, 1848, (9 Stat., 303,) enacts that the Paymaster General may, in his discretion, allow to any paymaster's clerk, in lieu of the pay now allowed by law, an annual salary of seven hundred dollars.

The 2d section of the act of August 23, 1842, (5 Stat., 510,) prohibits any person whose salary is fixed by law from receiving any additional compensation.

The 2d section of the act of March 3, 1849, (9 Stat., 413,) provides that all persons in public employment, who have received payment for their services in collecting, keeping, or accounting for moneys, and for other necessary services, are authorized to retain so much of the amounts so received, as, in the opinion of the President, may be a fair compensation for their services.

The 4th section enacts, that, where accounts are rendered for expenditures, under the approval and sanction of the proper officers, which appear to be proper and necessary, &c., the same may be paid out of the contribution fund, on the approval of the head of the proper department.

The act of August 31, 1852, section 7, (10 Stat., 108,) extends the provisions of the act of March 3, 1849, to all persons who were engaged in the collection of military contributions; and the act of March 3, 1853, section 5, (10 Stat., 218,) extends the provisions of the last named act to all persons who were engaged as receivers of military contributions in Mexico.

It is stated in the petition that the claimant was employed as a paymaster's clerk, and served in that capacity with Colonel Randall, during the war with Mexico, at the salary of \$500 per annum; and that the duties of paymasters being very much increased, they were allowed by the Secretary of War to employ more clerks at "a reasonable compensation." Many of the clerks resigned, and were re-employed at a compensation of \$3 per day. The claimant, however, did not resign, but continued to perform his duties at his regular salary. Colonel Randall states in his letter of December 26, 1850, that the expense of one or more additional clerks was saved to the government by the claimant, "under the assurance from me that he should be allowed increased compensation for his extraordinary services, and which, it was understood, had, in many cases, been allowed other paymasters' clerks." He says, also, "I earnestly recommend that he be allowed the highest rate of pay that has been received by any paymaster's clerk in the public service during the war with Mex-

ico." Colonel Larned, the acting paymaster general, in his certificate of February 21, 1852, fully coincides in opinion with Colonel Randall, and states that the claimant "is justly and equitably entitled to the compensation asked for;" and says that "the extra services performed by him would have justified the employment of additional clerks at a much greater expense than the allowance prayed for."

Upon the application of the claimant to the Secretary of War for extra compensation, he was informed that the department had no authority to pay his claim. The Secretary, in his letter of July 24, 1852, says: "Had you resigned your regular appointment and annual salary, and been re-engaged by Colonel Randall at \$3 a day, that amount could now be paid you; or had Colonel Randall actually paid you at that rate, the payment could now be sanctioned by this department, under the special authority given by an act of March 3, 1849; and in either case I should not hesitate to pass the account. But while you held the appointment of paymaster's clerk, you were within the act of August 23, 1842, which prohibits all those whose pay is fixed by law or regulation to receive any additional pay, extra allowance, or compensation; and the act of 3d March, 1849, which would have authorized the department to allow any extra compensation which might have been actually paid you, under the peculiar circumstances, by the proper disbursing officer, does not, under the settled construction adopted here, authorize the Secretary of War himself to make or order such payment at this time. For these reasons, however equitable the claim may be, I do not consider that I have authority to allow it."

We think that the construction given by the Secretary of War to the acts is correct. The 2d section of the act of March 3, 1849, refers to persons who have received payment for their services, and authorizes them to retain a fair compensation. This is the only section which would authorize any compensation to be made to the claimant, and he does not come within its provisions. He has not received payment for his services, and consequently cannot retain any money which might be applied for the purpose of compensating him. He is seeking payment, and there is no act of Congress which would give him a legal cause of action. But he has a strong equitable claim upon the United States. He did his duty faithfully and well, and the evidence shows that his industry and capacity saved the government the expense of one or more additional clerks. It would be just and right that he should be placed upon an equality with other paymasters' clerks, and should receive the sum of \$1,273 for his services, according to the statements in his petition, although, for the reasons stated, our opinion is, that he has no legal cause of action against the United States.

H. L. THISTLE.

JULY 25, 1856.—Committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

HEZEKIAH L. THISTLE vs. THE UNITED STATES.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of H. L. Thistle vs. The United States:

1. The petition of the claimant.
2. Claimant's brief.
3. Opinion of the court refusing an order to take testimony.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this tenth day of July,
[L. S.] A. D. 1856.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable John J. Gilchrist, Presiding Judge, and the honorable Isaac Blackford and George P. Scarborough, Judges of the United States Court of Claims:

The amended petition of Hezekiah L. Thistle respectfully shows to this honorable court—

First. That your petitioner is a citizen of the United States, and at present residing in the city, county and State of New York.

Second. That your petitioner was on or about the 18th day of January, A. D. 1842, appointed by the Navy Department, under the hand of the Hon. A. C. Upshur, then Secretary of the Navy, a government agent for the preservation of timber on the public lands of Florida; and that he continued in said office as said agent up to the 16th day of August, A. D. 1845.

Third. That your petitioner's duties as such live-oak agent were briefly as follows: "To superintend from waste and destruction, removal, and every species of depredation, all the timber and wood

growing on said government lands;" and the Navy Department, in your petitioner's commission as said agent, instructed him as follows: "That the department relied on his unremitting exertions, and a prompt resort to all proper means within his power for the effectual discharge of his duty. If necessary, he should invoke not only the assistance of the civil authority, but also, so far as it could be lawfully given, that of the officers of the army and navy, for the successful and complete accomplishment of the important trust committed to him."

Fourth. That your petitioner while in the discharge of his duties as aforesaid, and on or about the 1st of February, A. D. 1843, *informed of, seized, and captured* a quantity of live oak timber, which had been cut and removed from government lands in Florida, by sundry persons unauthorized and having no right so to cut and remove the same, which said timber had been hewn and fashioned into keelson and beam-pieces for ship-building, before its seizure, and thus greatly improved its value; that said timber was therefore libelled, condemned, and appropriated by the United States government to its own use, the same having been shipped to, and received at the United States navy yard at Gosport, by your petitioner. And that thereupon the United States also appropriated to its own use the improved value of said timber consequent upon the cutting, hewing, and fashioning the same as aforesaid, which had been done by the persons cutting and removing the same from the public lands. That according to the measurement of James Jarvis, the then inspector at said navy yard, said timber amounted to five thousand one hundred and forty (5,140) cubic feet.

Your petitioner also shows, that on or about the 1st day of June, A. D. 1843, he informed of, seized and captured, a quantity of live oak timber, under the same circumstances as aforesaid, which was libelled, condemned, and by your petitioner shipped to the said navy yard, and was appropriated by the United States, together with the improved value, which was the same as aforesaid, which said timber, by the measurement of the said inspector, amounted to three thousand five hundred and twenty-five (3,525) cubic feet.

Fifth. Your petitioner further shows, that the total amount of said timber, according to the said measurements, was eight thousand six hundred and sixty-five (8,665) cubic feet, and that the improvement in the value of said timber, between its value as standing timber and its value when hewn and fashioned as aforesaid into keelson and beam-pieces, for ship-building, amounted to one dollar and fifty (\$1 50) cents per cubic foot, which would amount upon the whole of the aforesaid timber to twelve thousand nine hundred and ninety-seven $\frac{1}{2}$ ¢ dollars (\$12,997 50.)

Sixth. Your petitioner also shows, that according to an act of Congress, passed during its twenty-first session, entitled "An act to provide for the punishment of offences committed in cutting, destroying, or removing live oak, or other timber, or trees reserved for naval purposes," approved March 2d, A. D. 1831, your petitioner, as the informer, seizor and captor of the aforesaid confiscated live oak timber, was entitled to receive of the United States one-half of the value of the improvement of the same, to wit: one-half of the difference in its value, between the worth of the same while standing, and

its value when received at the navy yard, as aforesaid ; that the third (3d) section of the said act, to which your petitioner more particularly refers, is partly in the words and manner following, to wit : "*Shall be paid over one-half to the informer or informers, if any, or captors when seized.*"

Seventh. Your petitioner further shows, that on or about the 1st day of December, A. D. 1845, he rendered his account against the United States, to the Navy Department, at Washington, which account, among other items, contained a charge and claim for one-half of the value of the improvement in the said timber as aforesaid, which said claim was rejected, by the said Navy Department, on the ground that your petitioner's claim did not come within the scope and meaning of said act of Congress. But your petitioner shows and avers, that the Navy Department had paid and allowed him similar claims, based upon precisely the same facts as aforesaid, at times antecedent to the date from which this your petitioner's claim accrued.

Eighth. Your petitioner therefore insists, that by reason of the premises aforesaid, he was, and still is entitled to compensation for one-half the value of the improvement in said timber, as aforesaid, amounting to six thousand four hundred and ninety-eight $\frac{1}{100}$ dollars, (\$6,498 $\frac{75}{100}$;) and that by reason of the refusal of the Naval Department to allow the said claim and amount when presented, your petitioner became, and was, and is, entitled to interest upon the last above named amount, at the legal rate, from the 1st day of December, A. D. 1845.

Wherefore, your petitioner prays for the adjudication of this honorable court, and that such relief may be granted and decreed to him in the premises as shall seem meet to this court.

GEO. D. KELLOGG,

Petitioner's Attorney,

25 Nassau street, New York.

STATE OF NEW YORK, }
City and County of New York, } ss:

Hezekiah L. Thistle, the said petitioner, being duly sworn, says that the foregoing petition is true to the best of his knowledge, information and belief.

Sworn to before me, this day of February, 1856.

U. S. COURT OF CLAIMS.

HEZEKIAH L. THISTLE	}	Petitioner's brief.
against		
THE UNITED STATES, for compensation		
as timber agent.		

First Point.—The compensation asked for in the petition should be granted, because—

1. Petitioner was the *informer*, as well as the *captor* of the forfeited property.

2. The informer is as much entitled to *one-half* of the *forfeiture* and *recovery* as the *captor*, where the seizure is made.

Petitioner was both. (Act of March 2d, 1831, § 3.)

Second Point.—Petitioner's claim is clearly within the scope and meaning of the act of March 2d, 1831, because—

1. There was a *recovery* by the United States in due form of law, which consisted not only of the timber itself, but of the improvements in the value of the same, which improvement was effected by the *labor* of the unauthorized persons who cut and carried away the same from the public lands, the results of which labor were forfeited, one-half to the informer, &c., and one-half to the United States. (Petition, fol. 5. Ditto, fols. 4 and 6.)

2. The forfeiture was the only recovery in both cases mentioned in the petition, and therefore petitioner is entitled to recover one-half the said forfeited improvement, that being the labor of third parties, and the results of which went for the benefit of the government. (Act of 2d March, § 3.)

3. The government having appropriated the timber seized, with all its improvements, to its own use, debarred the petitioner from receiving half of the timber itself. And the United States should therefore pay him half of the value of the said improvement at contract prices. (Petition, fols. 4 and 6.)

4. Petitioner does not claim the value of the timber while standing, in addition, that being the property of the United States, in any event; but one-half the difference between its worth as standing and its value as improved, that being that part of the recovery actually forfeited, to be divided as provided in the said act of March 2d, 1831.

Third Point.—The petitioner is not debarred from receiving any compensation to which he may be entitled by reason of this act, on account of his being a salaried officer. Because—

1. Collectors of customs are salaried officers, and yet receive one-half the proceeds of certain forfeitures. (Custom laws from 1789.)

2. Officers of the United States are the only persons who have a right and are authorized to make such seizures, and petitioner was directed by his instructions to make such seizures.

3. It would be unjust to give the "*captors where seized*" a right by law to receive one-half the recovery, and then because such *captor* is a salaried officer refuse *him* his portion of the forfeiture, merely by the regulation of a department, without any legal provision whatever for such a course.

4. The naval department stultifies itself by refusing to pay the petitioner his present claim, they having before allowed him compensation for seizures of stolen government timber. (Petition, fol. 10.)

Fourth Point.—Petitioner is entitled to interest, for, if his claim is to be allowed at all, it should have been allowed when presented in 1854, and the compensation now asked for should have then been

paid, and petitioner has been entitled since then to the use of said compensation. (Petition, fol. 10.)

GEO. D. KELLOGG,
Petitioner's Att'y.
A. THOMPSON,
Of Counsel.

HEZEKIAH L. THISTLE vs. THE UNITED STATES.

The opinion of the court was delivered by SCARBOROUGH, J.

The petitioner was appointed, on the 18th day of January, A. D. 1842, by the Secretary of the Navy, an agent for the preservation of timber on the public lands of Florida, and continued in office till the 16th day of August, A. D. 1845.

Whilst in the discharge of his duty, the petitioner on or about the 1st day of February, A. D. 1843, informed of, seized, and captured a quantity of live oak timber, which had been cut and removed from public lands in Florida by trespassers. The timber had been hewn and fashioned into keelson and beam-pieces for ship-building, before its seizure. It was libelled, condemned, and appropriated by the United States to their own use.

Afterwards, on or about the 1st day of June, A. D. 1843, the petitioner informed of, seized, and captured a quantity of live oak timber under similar circumstances. It was also libelled, condemned, and appropriated by the United States to their own use.

The total quantity of both parcels of timber was eight thousand six hundred and sixty-five cubic feet, and its improved value was one dollar and fifty cents a cubic foot, making an aggregate of twelve thousand nine hundred and ninety-seven $\frac{5}{100}$ dollars.

The petitioner claims, that under the 3d section of the act of Congress, approved March 2, A. D. 1831, (4 Stat. at Large, p. 472,) he is entitled to one-half of the value of the timber so seized, condemned, and appropriated by the United States.

The act of March 2, A. D. 1831, is as follows: "That if any person or persons shall cut, or cause or procure to be cut, or aid, assist, or be employed in cutting, or shall wantonly destroy, or cause or procure to be wantonly destroyed, or aid, assist, or be employed in wantonly destroying any live oak or red cedar tree or trees, or other timber standing, growing, or being on any lands of the United States, which, in pursuance of any law passed, or hereafter to be passed, shall have been reserved or purchased for the use of the United States, for supplying or furnishing therefrom, timber for the navy of the United States; or if any person or persons shall remove, or cause or procure to be removed, or aid or assist, or be employed in removing from any such lands which shall have been reserved or purchased as aforesaid, any live oak or red cedar tree or trees, or other timber, unless duly authorized so to do, by order, in writing, of a competent officer, and for the use of the navy of the United States; or if any person or persons shall cut, or cause or procure to be cut, or aid or, assist or be

employed in cutting any live oak or red cedar tree or trees, or other timber on, or shall remove, or cause or procure to be removed, or aid or assist, or be employed in removing any live oak or red cedar trees, or other timber, from any other lands of the United States, acquired, or hereafter to be acquired, with intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for the use of the navy of the United States ; every such person or persons so offending, on conviction thereof before any court having competent jurisdiction, shall, for every such offence, pay a fine not less than triple the value of the tree or trees, or timber so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months.

"SEC. 2. That if the master, owner, or consignee of any ship or vessel shall, knowingly, take on board any timber cut on lands which shall have been reserved or purchased as aforesaid, without proper authority, and for the use of the navy of the United States ; or shall take on board any live oak or red cedar timber cut on any other lands of the United States, with intent to transport the same to any port or place within the United States, or to export the same to any foreign country, the ship or vessel on board of which the same shall be taken, transported, or seized, shall, with her tackle, apparel, and furniture, be wholly forfeited to the United States ; and the captain or master of such ship or vessel wherein the same shall have been exported to any foreign country against provisions of this act, shall forfeit and pay to the United States a sum not exceeding one thousand dollars.

"SEC. 3. That all penalties and forfeitures incurred under the provisions of this act shall be sued for, recovered, and distributed, and accounted for, under the directions of Secretary of Navy, and shall be paid, one-half to the informer or informers, if any, or captors, where seized, and the other half to the commissioners of the navy pension fund, for the use of the said fund ; and the commissioners of the said fund are hereby authorized to mitigate, in whole or in part, and on such terms and conditions as they shall deem proper, and order, in writing, any fine, penalty, or forfeiture incurred under this act."

It is obvious, that the improved value of the timber in question was not either a fine, penalty, or forfeiture "incurred under the provisions of this act." The timber in its improved condition was as much the property of the United States as it was before the trespassers took it into their possession. The latter lost their labor, but the improved value of the timber was not forfeited. A forfeiture implies that there was some right to be forfeited. But no right whatever was ever acquired in the timber by the wrong-doers, in whose possession it was found by the petitioner. 2 Kent's Com., 435, (8th edition ;) 2 Parsons on Contracts, 474-'5. We are, therefore, of the opinion that the petitioner is not entitled to relief. No order will be made directing testimony to be taken in this case.

ABEL GAY.

JULY 22, 1856.—Committed to a Committee of the Whole House and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

ABEL GAY vs. THE UNITED STATES.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of Abel Gay vs. The United States:

1. The petition of the claimant.
2. Opinion of the court, unfavorable to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this 10th day of July, A. D. 1856.

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

To the Honorable the Judges of the United States Court of Claims:

The petition of Abel Gay, survivor of Walter Loomis and Abel Gay, joint contractors, of Lebanon, in the State of Connecticut, respectfully represents: That, in the year 1817, the said Loomis and Gay entered into a contract for building three miles of the western division of the Cumberland road, while the work was under the superintendence of Josias Thompson, as United States commissioner; the said Loomis and Gay contracted with the United States to build side walls and to prepare coping stone for parapet walls at a place called Buffalo Hill, near Mills's barn; that, during the progress of the work, the superintendent determined to alter the plan for making the road, and directed the petitioners to conform to his new plan, thereby greatly increasing the expenses of the work to the contractors, for all which he assured them the United States would compensate them. The contractors constructed the road agreeably to the directions of the superintendent; but, before the road was completed, the superintendent was removed from office, and commissioners appointed to inspect the work done under

Thompson's superintendence, and the money due to the claimants for work actually done was unjustly detained, to their great injury.

An act of Congress was passed on the 2d July, 1836, for the relief of said Loomis and Gay, which contains a provision that the balance paid them shall not exceed \$41 71—a small balance due to them under a measurement of their work done before Thompson went out of office—but made no provision to pay them for the extra work done by them as such contractors, nor for the amount due them for parapet walls, coping stone, and other work done in which they were original contractors.

After repeated applications to Congress and sundry favorable reports of committees, during the first session of the 30th Congress, a bill was reported by the Committee of Claims of the Senate, which was passed and approved on the 29th day of March, A. D. 1848, which was as follows, viz :

“ AN ACT in addition to an act for the relief of Walter Loomis and Abel Gay, approved July second, eighteen hundred and thirty-six.

“ Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be and he is hereby authorized to settle, upon principles of equity, the accounts of Walter Loomis and Abel Gay, so far as they are original contractors for making the Cumberland road, and so far as they contracted to make said road, or any part thereof, different from the original contract, and for keeping the same in repair ; and to pay any balance that may be found due to them out of any money in the treasury not otherwise appropriated.”

Your petitioners would further show that, from the time of the performance of the said work to the present time, they have constantly claimed of the different departments of the government the payment of the amount so due to them and improperly withheld ; and that, as early as the second session of the 21st Congress, in the year 1831, they petitioned Congress on the subject. That the claims of other contractors on said road, based on the same grounds, have long since been paid and settled by special acts of Congress. And although, by said act of Congress, the Secretary was authorized to settle the accounts of your petitioners “ *on principles of equity,*” under which expressions, according to the practice of Congress, it is understood that interest is to be paid, yet the accounting officers of the government only allowed the principal sum, due by the government more than thirty years previously, and refused to allow the interest on the same.

The amount allowed and paid to your petitioners under said act of Congress was three thousand nine hundred and twenty-one $\frac{71}{100}$ dollars, and your petitioners now claim the interest on said sum from the time when said work was done by your petitioners.

Since the passage of the act of Congress for the relief of your petitioners as aforesaid, they have not presented their present claim to Congress for interest. Petitions on the original claim and for interest were presented to Congress by your petitioners during the 2d session of the 21st Congress, in the House of Representatives.

In the Senate, at the 1st sess. 23d Cong., a favorable report was made by the Committee on Roads and Canals, but not acted upon. During the seven successive sessions of Congress following, viz: 2d sess. 23d Cong., 1st sess. 24th Cong., 2d sess. 24th Cong., 2d sess. 25th Cong., 3d sess. 25th Cong., the 1st and 2d sessions 26th Cong., favorable reports were made on said claim, and a bill passed the Senate for the relief of your petitioners. During the 1st and 2d sessions of the 28th Cong. the petition was referred to the Committee of Claims of the Senate, but no report made on the same. At the 1st sess. of the 29th Cong. a bill passed the Senate for their relief, and at the 1st sess. of the 30th Cong. the bill passed the Senate, which subsequently passed the House of Representatives, and was approved 29th March, 1848, and which is the act hereinbefore referred to.

Your petitioner, therefore, respectfully claims of your honors, that, according to well settled principles of law and equity, and the practice of the government in similar cases, he is entitled to interest on the amount of his said debt against the government, and asks that the same may be paid, and that your honors will afford adequate relief in the premises.

ABEL GAY.

Dated at Norwich, November 16, A. D. 1855.

UNITED STATES OF AMERICA, }
State of Connecticut, county of New London, } ss.

NORWICH, November 16, A. D. 1855.

I, John T. Wait, a commissioner in and for the State of Connecticut, duly appointed and authorized by the honorable Court of Claims of the United States to take the testimony of such witnesses as may come before me, to be used in the investigation of such claims as may be presented to said court against the United States, and to administer oaths and affirmations, do hereby certify, that on the said 16th day of November, A. D. 1855, before me, said commissioner, personally came Abel Gay, to me personally known to be the claimant named in, and who has subscribed the foregoing petition; and having by me, said commissioner, been duly cautioned to speak the truth, the whole truth, and nothing but the truth, then and there made solemn oath that the facts stated in the foregoing petition by him, said claimant, subscribed, are true, to the best of his knowledge and belief.

JNO. T. WAIT,
A Commissioner for the Court of Claims.

ABEL GAY vs. THE UNITED STATES.

Opinion of the court, delivered by BLACKFORD, J. :

The petition alleges that the claimant and one Walter Loomis, now deceased, contracted, in 1817, to build for the United States three miles of the western division of the Cumberland road; that the con-

tractors were to build side walls and to prepare coping stone for parapet walls at a place called Buffalo Hill ; that during the progress of the work the superintendent determined to alter the plan for making the road, and directed the contractors to conform to his new plan, thereby greatly increasing the expenses of the work, assuring them that the United States would compensate them ; and that the contractors constructed the road agreeably to the directions of the superintendent.

The petition further alleges that, in 1836, an act of Congress was passed for the relief of the contractors, but that it made no provision to pay them for their extra work, nor for the amount due them for parapet walls, coping stone, and other work done by them as original contractors ; that after repeated applications to Congress the following act was passed in 1848 :

“An act in addition to an act for the relief of Walter Loomis and Abel Gay, approved July 2d, 1836.

“*Be it enacted, &c.*, That the Secretary of the Treasury be, and he is hereby, authorized to settle, upon principles of equity, the accounts of Walter Loomis and Abel Gay, so far as they are original contractors for making the Cumberland road, and so far as they contracted to make said road, or any part thereof, different from the original contract, and for keeping the same in repair ; and to pay any balance that may be found due to them, out of any money in the treasury not otherwise appropriated.” 9 Stat. at Large, p. 711.

The petition further alleges that the amount allowed and paid to the contractors under said act of Congress of 1848 was \$3,931 71. The claimant now claims interest on that sum from the time when said work was done, in 1817, to the time of filing his petition in this court.

We are of opinion that we have no jurisdiction in this case. The contractors petitioned Congress for relief, and Congress, in 1848, referred the case to the Secretary of the Treasury, authorizing him to settle the account upon principles of equity. The Secretary, accordingly, settled the account and found a certain sum to be due to the contractors ; and that sum was paid to them. The circumstance that, by the act of Congress, the Secretary was to settle the account upon the principles of equity, did not necessarily require that interest should be allowed upon the sum found due.

We are therefore of opinion that the claimant is not entitled to recover.

JOSEPH D. BEERS.

[To accompany bill C. C. No. 17.]

JULY 25, 1856.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled :

The Court of Claims respectfully presents the following documents as the report in the case of Joseph D. Beers *vs.* the United States :

1. The petition of the claimant.
2. Claimant's brief.
3. Deposition in the case, and transmitted to the Senate.
4. Other exhibits offered as proof by the claimant, and transmitted to the Senate.
5. Opinion of the court.
6. Bill for relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed [L. s.] the seal of said court, at Washington, this tenth day of July, A. D. 1856.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

To the Court of Claims of the United States :

The petition of Joseph D. Beers, of the city of New York, respectfully shows: That in the month of December, 1849, J. B. Nalle, then being a purser in the United States navy, at San Francisco, in the State of California, with full authority from, and for, and on account of, the Navy Department of the United States, and in pursuance of instructions from said department, made certain drafts upon Wm. Ballard Preston, then being Secretary of the Navy of the United States, in favor of Thomas Ap C. Jones, then commander-in-chief of the Pacific squadron, which drafts so made and endorsed by Commodore Jones to Messrs. Moffatt & Co., of San Francisco, were endorsed

by them over to your petitioner, who thereupon advanced to said drawer, for and on account of the Navy Department of the United States aforesaid, the amounts of said drafts.

That such drafts, amounting, in all, to the sum of \$12,000, were duly honored and paid by said department upon presentment thereof; that when said drafts were so paid, your petitioner was informed at the department, in Washington, and by the said Secretary, that they were advised of further drafts from the same source, and that the same would be accepted and paid when presented.

That on the 31st day of January, 1850, Purser Nalle, in pursuance of instructions from the said department, and in his official capacity, and at the command of Commodore Jones, made his draft upon the said Secretary for \$20,000 to the order of Commodore Jones; that said draft was endorsed by the said payee to the order of Moffatt & Co., who endorsed it to the order of your petitioner, upon which draft, on the said 31st day of January, Purser Nalle, for and on account of the Navy Department of the United States, received from your petitioner the sum of \$20,000. And your petitioner further shows, that as soon as said draft was received from San Francisco—to wit: on the fifth day of April, 1850—he presented it in the same manner as he had done the before-mentioned drafts, for acceptance, to the Hon. Wm. Ballard Preston, Secretary as aforesaid. That said drawee retained said draft in his possession, without returning the same, or giving your petitioner any notice of his intention not to accept the same, until the tenth day of April following, when the said Secretary returned the said draft by mail, with notice that the said department declined to honor it.

That when the said draft was so received by your petitioner, the following words were written upon the face of it, in red ink: "Paid by requisition No. 9388."

That in consequence of the delay in returning said bill by the said Secretary, and his retention of the same for five days, as well as by the act of the said drawee in writing "paid" on the face of said bill, your petitioner lost the right of protesting and returning said bill to the drawer and endorsers, and thereby lost his recourse against them for his costs and damages in consequence of said dishonor, and the said department thereby became liable to pay the damages which your petitioner had sustained in consequence thereof.

That on the 9th day of August, 1850, your petitioner was informed by the then Secretary of the Navy, the Hon. Wm. A. Graham, that the department had decided to pay said draft. That thereupon your petitioner proceeded to the city of Washington to receive the same, and demanded the amount thereof, together with interest, costs, and such damages as by the commercial usage of California, where said draft was made, he was entitled to. That the said Secretary at that time declined to pay such damages until further examination and consideration, but offered to pay the face of said draft without prejudice in any way to the claim of your petitioner for such damages. That your petitioner thereupon received said principal sum of twenty thousand dollars upon such understanding and without prejudice, and delivered to said department said draft. That he thereupon pre-

sented his claim to said department for such damages, which subsequently decided not to pay the same, and accordingly have never paid the same, nor has your petitioner ever received any costs, interests, or damages upon said draft so returned in manner aforesaid. He further shows, that he is the sole owner of said claim, and that no other person has any interest in the same, and that no proceedings have been taken by him before Congress or elsewhere to recover the same, except as above set forth.

And he further shows, that, by reason of the premises, he claims against the United States interest on said sum of twenty thousand dollars, from the 11th day of April, 1850, at the rate of ten per cent., damages therein at the rate of twenty per cent., and his costs and expenses incurred in consequence of the retention and return of said draft.

JOSEPH D. BEERS.

COURT OF CLAIMS.

In the matter of the claim of } *Brief of Claimant.*
 Joseph D. Beers.

The petition states the facts in as few words as they can be presented, and raises the following points:

1. That Purser Nalle, in drawing, and Commodore Jones, in endorsing the draft, at San Francisco, for \$20,000, acted for and on behalf of the United States, in raising money for the use of the Pacific squadron, and were legally authorized to draw the same, as is shown by the following facts stated in the petition:

1st. That the United States had heretofore paid drafts to the claimant, made by the same officers, for money advanced to them at the same point.

2d. That the claimant was informed by the Secretary, when said drafts were paid, that more were expected from the same source, which would be paid.

3d. That when said draft reached the department, the words "paid by requisition No. 9388" were written upon the face thereof, by direction of the Secretary.

4th. The actual payment of the draft after it had been dishonored.

2. The retention of the draft for five days by the Secretary was of itself an acceptance of it, and made the party retaining it responsible for the damages which the holder would have been entitled to against the drawer and endorser, had the draft been returned and protested.

The Secretary had already accepted drafts held by the claimant from the same drawer, and informed the claimant that more were expected. This, together with the fact that the word "paid" was written upon the draft at the department, before its return to the claimant, constitutes sufficient "additional circumstances" to the retention of the draft over twenty-four hours to put the claimant upon his right to treat the draft as accepted by the Secretary, and is of the class of cases in which an acceptor may be liable. Story on Bills, 464,

section 398, and the cases cited in the note. Damages are now given in lieu of re-exchange, and are governed by the *lex loci contracti*. Story on Bills, section 399, do. 153. *Harvey vs. Martin*, 1 Campbell, 425. 3d Kent's Com., 82, 83, 85. Bayley on Bills, 324. This is also the rule in France; Code de Commerce, No. 125. 1 Pardess, 383; 2d Pardess, 396. See also Story on Bills, 243, and Chitty on Bills, 324.

3. Confessedly, had the draft been returned forthwith, (that is, according to the commercial usage in England and here, and now in many of the States, by statute, in twenty-four hours,) the holder could have protested it and recovered his damages from the drawer and endorser.

So, had the holder lost the right to recover those damages against the drawer and endorser in consequence of the acts or omissions of the drawee, then the latter would be responsible to the former in an action on the case to the extent of these damages.

And so, if an agent in the business of the principal draw upon his principal, and the principal dishonor the agent's drafts, the principal is directly liable to the holder for the damages. (Bayley on Bills, 381; ed. of 1836. 7th Cranch, 500. *Riggs vs. Linsley*.)

It will be seen that these elementary propositions are embraced within the facts stated in the petition, and entitle the claimant to a recovery for damages, according to the commercial usages of California, interest and costs.

4. Every government, wherever it acts through its legally constituted officers, as to everything within the scope of their authority, is the principal in the transaction. Thus, if Purser Nalle and Commodore Jones were acting for the United States at San Francisco in drawing this bill and receiving money upon it for the use of the Pacific squadron, the United States was the principal in the transaction, drawing upon the head of one of its own departments at Washington. To this extent it is like an individual transaction. Suppose Messrs. Corcoran & Riggs to have a branch house at San Francisco, and to receive from Mr. Beers at that place \$20,000 upon their bill drawn by the house there upon Messrs. Corcoran and Riggs at Washington city, who refuse to accept the draft, or, after acceptance, return it with notice of dishonor; in this case they would be clearly liable for the damages allowed by commercial usage against a drawer upon the dishonor of a bill of exchange.

But a transaction of this kind with a government rests upon still broader principles, because, as a general rule, the holder of a bill who deals with a government agent upon government account has no recourse against him personally. In the case in 1st Cranch, 363, Chief Justice Marshall laid down the rule, that "it is too clear to be controverted that where a public agent acts in the line of his duty, and by legal authority, his contracts made on account of the government are public and not personal."

Thus, if the United States are the principals in the transaction, they are the drawers of the bill in legal acceptance, and will not refuse to be liable to the same consequences as they impose upon their own citizens for the same acts or omissions.

(United States *vs.* Bank of the Metropolis, 15 Peters, 377. United States *vs.* Bank of United States, 2 Howard, 711.)

The following cases showing the action of Congress upon like questions are annexed :

Case of W. Thorp.

The holder of a protested bill, drawn by an agent of the government, is entitled to costs, damages, and interest.

The committee allowed ten per cent. on the amount from the time at which he became the holder of the bill.

(Senate Documents, 2d sess., 23d Cong., No. 44, made by Mr. Clayton, from the Committee on the Judiciary. 6 Stat. at Large, 548.)

Case of Ward and Smith.

Ward and Smith, for the use of the navy, advanced, in money and supplies, in February, 1847, \$5,912, with the expectation of being reimbursed by a bill or bills to be drawn on the Navy Department, with a suitable premium added. No bill was drawn. The principal sum had been paid, but no premium or interest for the use of their money, or damages for its non-payment. "What ought to be paid them depends upon the usages in California when the money was advanced."

(Senate Rep., 1st sess., 30th Cong., No. 202, sanctioned by Congress. 9 Stat. at Large, 737.)

A claimant is entitled to damages when money is withheld for want of the necessary action of the government.

(Senate Reports, 1st sess., 32d Cong., No. 241. Ditto, 1st sess., 23d Cong., No. 21. Ditto, 2d sess., 31st Cong., No. 228.)

A draft was drawn upon the Post Office Department for money due for mail service, and negotiated at a bank. It failed to be paid at maturity, the department being out of funds.

Committees of both houses of Congress reported in favor of paying costs and damages, (including interest,) and an act was passed to that effect.

(Senate Documents, 25th Cong., 3d sess., No. 112. Ditto, 26th Cong., 1st sess., No. 85. Ditto, 26th Cong., 2d sess., No. 75. 6 Stat. at Large, 848.)

Case of Michael Hogan.

The claim submitted for the action of Congress is for the allowance of \$3,142 28, being the damages, costs, charges, and interest incurred by him on certain bills of exchange drawn on the Navy Department, (of which he was an agent,) and not duly honored on presentation.

The bills ought to have been honored and paid, because they were properly drawn, and the money was due, as appeared by subsequent statements furnished by the department.

Several committees reported that the claimant was entitled to costs, damages, charges, and interest, for the bills drawn on the department for reimbursement and not duly honored.

(Senate Documents, 1st sess., 23d Cong., No. 344. Ditto, 1st sess., 24th Cong., No. 27. Ditto, 1st sess., 30th Cong., No. 105.)

And these views were confirmed by Congress. 9 Stat. at Large, 742.

The Legal Nature of a Report.

"Considering the report, as I do, in the light of a preamble to the law, I think that its principles ought to be respected so far as they go."

(Opinions of Attorney General, Mr. Wirt, Ex. Doc., 2d sess., 31st Cong., No. 55, vol. 1, page 390.)

There is no law inhibiting accounting officers from allowing interest to claimants, if it shall appear that interest is justly due them.

(Ib., page 785, Taney.)

SAMUEL E. LYON,
Counsel for Claimant.

OFFICE OF ATTORNEY GENERAL,
November 14, 1851.

By the papers enclosed to me for my opinion, it appears that on the 31st January, 1850, in pursuance of instructions from the Navy Department, and of the command of Thomas Ap C. Jones, commander-in-chief of the Pacific squadron, Purser Nalle, in his official capacity, drew, at San Francisco, on the Hon. William Ballard Preston, Secretary of the Navy at Washington, for \$20,000, payable at three days' sight, to the order of "Thomas Ap C. Jones, commander-in-chief of the Pacific squadron." This was endorsed by the payee to the order of Moffatt & Co., who endorsed it to the order of J. D. Beers, who presented it for acceptance to the Hon. William Ballard Preston, Secretary of the Navy, at the Navy Department, on the 5th of April, 1850. On the 9th of that month, a clerk in the department wrote on the face of the bill, in red ink, "Paid by requisition No. —." On the 10th of April, 1850, the bill was returned to Mr. Beers, with advice that the department declined to honor it. On the 9th of May, 1850, in answer to a letter of the preceding day, the department informed Mr. Beers "that no advice had been received from California relative to the draft of Purser Nalle." On the 14th of June, 1850, in answer to Mr. Beers's letter of the preceding day, he was informed by the department that no advice relative to the draft had been received since the letter to him of the 9th of May. On the 9th of August, 1850, Mr. Beers was informed that the department had decided to pay the draft of Purser Nalle; and it was accordingly paid on that day, and the bill was taken up by the Navy Department.

Now, Mr. Beers claims of the department interest and twenty per cent for damages, as such damages are given by the law of California (as it is said by Mr. Beers,) upon protested bills of exchange.

The argument of counsel presented by Mr. Beers admits "there are technical difficulties in the way," but contends that Mr. Beers

"is equitably entitled to demand damages from the government ;" because, by paying the bill, notwithstanding the objection made at its presentation, the government concedes that Purser Nalle had authority to draw it, and therefore it should have been paid without delay ; and that the writing on the face of the bill "paid," done wrongfully at the department, prevented the holder "from returning the bill and demanding damages of the drawer and endorser ; and as the bill has been paid, Mr. Beers has lost his recourse against them."

The learned counsel well knew that there was no legal foundation for demanding damages against a drawee for refusing to accept a bill, and therefore alluded to the recourse which might have been taken against the drawer and endorsers.

To charge the endorsers or drawer of a foreign bill of exchange, it is essential to prove a protest, either for want of acceptance or for non-payment ; this protest is a part of the constitution of a foreign bill. (*Brough vs. Perkins*, 1 Satt., 131 ; *Tassell & Lee vs. Lewis*, 1 Lord Ray, 743 ; *Gale vs. Walsh*, 5 Term Rep. 239 ; *Townsley vs. Sumrell*, 2 Peters, 179, 180.)

This bill, drawn at San Francisco, California, upon a person in the city of Washington, is to be treated as a foreign bill. (*Buckner vs. Findley*, 2 Peters, 589 ; 3 Kent's Comm., 93-94.)

In this case, therefore, to charge the drawer or endorsers, a protest for non-payment was indispensable.

But Mr. Beers did not cause any protest.

The act of the department, in writing "paid" on the face of the bill, is relied on.

That the clerk (or Secretary of the Navy) wrote the words "paid by a requisition No.—," when in fact there was no payment, was no obstacle to a protest for non-acceptance and for non-payment, if the holder had elected to pursue the endorsers and drawer, instead of waiting on the drawee for payment, when advices and explanations from the purser or the naval commander should be received.

(*Chitty on Bills*, p. 243 ; *Bentinet vs. Dorrein*, 6 East., 199.)

Mr. Beers voluntarily left the bill in the department from the 5th to the 10th of April, without calling for it. It was then returned to him ; after which he waited for advices and explanations to be given to the department by the purser and the naval commander ; accepted payment from the drawee, and gave up the bill. By his own voluntary acts—in waiting without protest, in accepting payment from the drawee, and surrendering the bill—Mr. Beers released the endorsers and the drawer.

The act of the department did not prevent the holder from causing a protest, if he had preferred seeking recourse upon the endorsers and drawer, rather than relying on his expectation of payment from the Navy Department. The learned counsellor who wrote the argument for Mr. Beers would not commit himself by asserting an opinion that the writing of the word "paid" on the bill by a clerk in the department, when, in truth, no payment had been made, was any legal obstacle to protesting the bill. After writing that this act "prevented you" (Mr. Beers) "from protesting and returning the bill, and de-

manding damages of the drawer and endorsers," he, upon second thought, erased the words "*protesting and*," thereby to leave the sentence "prevented you from returning the bill, and demanding damages of the drawer and endorsers; and as the bill has since been paid, you have, of course, lost your recourse against them."

The forbearance to cause a protest, the acceptance of payment from the drawee, and the surrender of the bill to the department, were voluntary acts of Mr. Beers—not compelled by what had been written on the face of the bill at the department. All that can be said of the words so written is, that they induced Mr. Beers to believe that the bill would be paid by the Navy Department, if satisfactory explanation was given by the purser or naval commander; and that Mr. Beers, contenting himself with such expectation, did not cause any protest to be made, and finally received payment from the department, and gave up the bill. Mr. Beers having accepted payment and surrendered the bill, the matter was settled; and his claim for any further amount for interest or damages is, in my opinion, destitute of any just foundation, and ought not to be allowed or paid at the treasury of the United States.

Very respectfully, yours, &c.,

J. J. CRITTENDEN.

Hon. WM. A. GRAHAM,
Secretary of the Navy.

JOSEPH D. BEERS vs. THE UNITED STATES.

The opinion of the court was delivered by Scarborough, J.

On the 21st day of January, A. D. 1850, Thomas B. Nalle, a purser in the navy of the United States, in pursuance of instructions from the Navy Department, and by the command of Thomas Ap C. Jones, commander-in-chief of the Pacific squadron, drew a bill of exchange on William Ballard Preston, Secretary of the Navy, for twenty thousand dollars, payable to the order of Thomas Ap C. Jones, commander-in-chief of the Pacific squadron, three days after sight. This bill was endorsed by Thomas Ap C. Jones to Moffatt & Co., or order, who endorsed it to the order of the petitioner.

On the 5th day of April, A. D. 1850, the petitioner presented the bill to William Ballard Preston, Secretary of the Navy, at the Navy Department, for acceptance. On the 9th day of April, A. D. 1850, a clerk in the department wrote on the face of the bill, in red ink, "paid by requisition No. —." On the 10th day of April, A. D. 1850, the bill was returned to him with the remark, that "the department declines to honor it."

On the 9th day of May, A. D. 1850, in answer to a letter of the preceding day, the department informed the petitioner "that no advice had been received from California relative to the draft of Purser Nalle." On the 14th day of June, A. D. 1850, similar information was given him by the department. On the 9th day of August, A. D. 1850, the petitioner was informed that the department had decided to pay the

draft of Purser Nalle, and it was accordingly paid on that day, and the bill was taken up by the Navy Department.

See the letter of Hon. J. J. Crittenden, Attorney General, to Hon. William A. Graham, Secretary of the Navy, dated November 14, A. D. 1851, a copy of which is on file among the papers of this case.

The petitioner now claims fifteen *per centum* on the amount of the bill for re-exchange and interest. The rate of commercial damages upon protested bills of exchange in California in the year 1850 was, on inland bills fifteen *per centum*, and on foreign bills twenty *per centum*. The bill was drawn in California. See depositions of Wm. M. Burgoyne and Samuel Ward, and the letter of the Attorney General already referred to.

That the United States, by their authorized officers, were parties to the bill in question, both as drawers and drawees, is indisputable. It is stated by the Attorney General that it was drawn by the purser, under instructions from the Navy Department, and by the command of the commander-in-chief of the Pacific squadron, on the Secretary of the Navy. The doctrine appears to be well settled, that when the United States, by their authorized officer, become a party to negotiable paper, they have all the rights and incur all the responsibility of individuals who are parties to such instruments. There is no difference, except that the United States cannot be sued. *United States vs. The Bank of the Metropolis*, 15 Peters' R., 377. In that case the court say: "It [the Supreme Court] said in the case of the *United States vs. Dunn*, 6 Pet., 51, 'the liability of parties to a bill of exchange, or promissory note, has been fixed on certain principles, which are essential to the credit and circulation of such paper. These principles originated in the convenience of commercial transactions, and cannot now be departed from.' From the daily and unavoidable use of commercial paper by the United States, they are as much interested as the community at large can be in maintaining these principles." *Ibid.*, 302. It seems to be considered, too, that the United States are liable to damages, on a protested bill of exchange drawn by them, in the same manner and to the same extent as an individual. *Bank of the United States vs. United States*, 2 How. R., 711.

This bill, then, being drawn by the United States, their contract was, that the drawee should, on the bill being presented to him in a reasonable time from its date, accept the same, and, having so accepted it, should pay it when duly presented for payment according to its tenor. *Whitehead vs. Walker*, 9 Mees. & W., 506, 515. On the refusal of the drawee to accept the bill, if it had been a case between individuals, a complete right of action on the bill against the drawer would have accrued in favor of the holder. But this right of action would, in general, be forfeited in such a case, by the failure to cause the bill to be protested for non-acceptance, and the notice of the non-acceptance and protest to be given to the drawer. *Ibid.* This is the general rule; but there are exceptions to it. A protest is not required in the case of an inland bill, unless it is prescribed by the local municipal law. This, however, is the case of a foreign bill, and the protest cannot be excused on that ground. A protest affords satisfactory evidence of dishonor to the drawer, who, residing abroad, might experience a diffi-

culty in making proper inquiries on the subject, and be compelled to rely on the representation of the holder. It also furnishes an endorsee with the best evidence to charge an antecedent party abroad ; for the protest is evidence in all courts of the dishonor of the bill. Byles on Bills, 189 ; Story on Bills, sec. 277. It seems to be necessary, therefore, only where the object is to charge the drawer, and he might be prejudiced by the failure to make it. Hence, if the bill be drawn by the drawer without funds and without having any right to draw, the want of a protest will not prejudice the holder ; but he will be entitled to recover against the drawer, upon the ground that he has not, and could not, sustain any loss or injury thereby. Story on Bills, sec. 280. And so, a promise to pay the bill, after a full knowledge of the fact that no protest has been made, will, it is said, be a waiver of the objection by the party, and he will be held bound in the same way, and to the same extent, as if there had been a regular protest. *Ibid.*

The same doctrine is applicable to the subject of notice. It seems to be necessary only where the object is to charge the drawer, and he might be prejudiced by the failure to give it. If, therefore, the drawer has no right to draw the bill, or no reasonable ground to expect the bill to be accepted, he is not deemed entitled to notice of the dishonor thereof, for it was his own fault to draw it ; and he cannot be said to have suffered any loss by the want of notice. Hence, if the drawer draws the bill without having funds in the hands of the drawee, or expectation of funds, or any arrangement or agreement on the part of the drawee to accept the bill, he will not be entitled to notice, and not be discharged by the want thereof. Story on Bills, sec. 311.

It seems to be a principle fairly deducible from the authorities upon this subject, that, as between the holder and drawer, protest and notice may be dispensed with, where they must be unnecessary or immaterial to the drawer ; where the drawer could sustain no injury by the neglect of the holder to make a protest, or give him notice of the dishonor of the bill ; where the want of them could not possibly affect the drawer. *French vs. The Bank of Columbia*, 4 Cranch R., 141 ; *Dickens vs. Beal*, 10 Peters' R., 572. The rule, therefore, which requires a protest and notice, in order to charge the drawer, is not one of positive law, but it is founded in reason and the necessities of commerce. It requires notice and protest, not merely as an indemnity against actual injury, but as a security against a possible injury which may result from the *laches* of the holder of the bill. *Ibid.* Hence, it is a general rule ; but cases which do not come within the reason of the rule, form exceptions to it. In this case the United States were both drawers and drawees, and their interests could in no conceivable way be affected by the want either of a protest or of notice. There was no party to the bill in any way responsible to them, and their interest could not by possibility have been prejudiced by the failure to make a protest or give notice of the dishonor. It seems to us, therefore, that a protest and notice would have been wholly superfluous. There was no conceivable object to be accomplished by them.

Upon the dishonor of the bill, then, the United States, as drawers of the bill, became liable to the holder for the principal sum, and interest, and damages, and expenses incurred by the dishonor, and this

liability was not lost to the holder by his failure to have the bill protested, and to give notice of its dishonor. Story on Bills, sec. 399. The principal sum has been paid; but the liability of the United States for the interest and damages was absolute and complete at the time of its payment, and the mere surrender of the bill is insufficient to discharge that liability. It is neither a release nor a payment, nor in any sense a satisfaction. The liability, therefore, still exists. The damages in lieu of re-exchange are to be ascertained by the law of the place where the bill was drawn, and the interest by the law of the place where the money was payable.

Amount of bill.....	\$20,000 00
Interest thereon from the 11th day of April, A. D. 1850, to the 9th day of August, A. D. 1850—3 months 29 days—at 6 <i>per centum</i>	396 66
	20,396 66
Add damages, at 15 <i>per cent</i>	3,000 00
	23,396 66
Deduct payment of principal.....	20,000 00
	3,396 66

We shall, therefore, report to Congress a bill in favor of the petitioner for the sum of three thousand three hundred and ninety-six dollars and sixty-six cents, with interest thereon from the 9th day of August, A. D. 1850, till paid.

STURGES, BENNET & CO.

[To accompany bill C. C. No. 18.]

JULY 28, 1856.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled :

The Court of Claims respectfully presents the following documents as the report in the case of *Sturges, Bennet & Co. vs. the United States* :

1. The petition of the claimants.
2. Solicitor's brief in the case of John Durand & Co., and submitted in this case.
3. Petitioner's brief and solicitor's second brief.
4. Opinion of the court on the petition.
5. Judge Blackford's dissenting opinion on same.
6. Statement from collector of New York showing the amount of duties overpaid; transmitted to the House.
7. Statement of Secretary of Treasury and depositions taken by the United States and transmitted to House of Representatives.
8. Opinion of the court on the facts.
9. Judge Blackford's dissenting opinion on same.
10. Bill for relief of claimants.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this tenth day of July, A. D. 1856.

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Court of Claims :

Your petitioners respectfully represent, that during the years 1847, 1848, 1849, 1850, and 1851, they imported into the United States certain quantities of brandy and other liquors in casks, on which importation duties were imposed, and paid by them to the United States at the rate of 100 per centum, not only on the value of the quantity

of liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation—which was lost—which did not exist at the time when the duty was imposed, which was not and could not be imported into the United States.

Your petitioners claim a return of the moneys exacted from them as import duties on such leakage or non-imported liquors.

The claim of your petitioners is founded on the 16th and 21st sections of the act entitled "An act to provide revenue from imports, and to change and modify existing laws imposing duties on imports, and for other purposes," approved August 30, 1842; the 1st section and schedule A of the act entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846; the 2d section of the act entitled "An act to refund to certain persons an excess of duty exacted on the importation of foreign merchandise," approved August 8, 1846; and on the regulations of the Treasury Department, expressed in a letter of January 30, 1847, to the collector of New Orleans, and in printed circular letters of instructions to collectors bearing date August 10, 1850, and June 14, 1851.

It has been decided by the Supreme Court of the United States, in the cases of *Marriott vs. Brune et al.*, 9 *Howard*, 619; the United States *vs. Southmayd et al.*, 9 *Howard*, 637; and *Lawrence vs. Caswell et al.*, 13 *Howard*, 488, that according to law, duty was chargeable only on the value of the merchandise imported into the United States, and that the quantity lost by leakage on the voyage of importation was not subject to any duty.

The Secretary of the Treasury has acquiesced in the decision of the Supreme Court, and has allowed and paid numerous claims resting on the same basis as the claim of your petitioners for the return of the duties exacted on the value of deficiencies in importations of sugar and molasses, without requiring that protests should have been made against the illegal exactions, but he has refused to pay any such claims for the return of the duties exacted on the value of deficiencies in importations of liquors unless protests were made against the illegal exactions.

The claim of your petitioners was specially brought to the notice of the Treasury Department in the month of September last, and was under date of November 9, 1854, referred by the Secretary of the Treasury to the collector of New York, with instructions to certify the amount due to your petitioners, and report on the claim, which was accordingly done by the said collector, and a report made under date of November 16, 1854. The Secretary of the Treasury subsequently, in letters to the collector of New York, bearing date the 2d and the 12th of January, 1855, refused to pay the said claim upon the grounds that "no protest" had been made against the illegal exactions, and that a portion of the claim was "barred by the statute of limitation."

These objections are made by the Secretary of the Treasury under the act of Congress of February 26, 1845, in relation to the refunding of duties paid under protest and the statute of limitations of the State of New York.

Your petitioners believe and submit that such objections can have

no weight in your honorable court, whose authority is not limited by a law restricting the power conferred on the Secretary of the Treasury, nor by a statute of the State of New York in relation to suits between individuals in that State.

A particular account of the claim of your petitioners, which amounts to \$2,068, accompanies this petition, said account being a copy of the certified statement prepared by the collector of New York by order of the Secretary of the Treasury, the original of which is on file in the Treasury Department.

Your petitioners are sole owners of the claim now presented.

Your petitioners pray to be heard by counsel before your honorable court, and that their claim be adjudicated.

NEW YORK, June 21, 1855.

STURGES, BENNET, & CO.

City and County of New York, ss.

Benjamin G. Arnold, a member of the firm of Sturges, Bennet & Co., being duly sworn, deposes and says that the matters and things set forth in the foregoing petition are true to the best of his knowledge and belief.

BENJAMIN G. ARNOLD.

Sworn to this 21st day of June, A. D. 1855, before me,

J. HILLYER,
Commissioner of Deeds.

BRIEF OF THE UNITED STATES SOLICITOR.

The petitioners seek to have money refunded which was paid by them, as importers on their own account and as agents of others, for duties without protest, and which they could not recover, therefore, by suit against the collector. The collector charged and collected duties on the quantity stated in the invoices, and did not allow for the deficiency arising from leakage and other causes found to exist on gauging the casks, and it is for the return of the duties paid on the deficiency this petition is brought.

The Supreme Court has decided that the law required such reductions to be made in the duty, and that when they have not been made the importer could recover the excess from the collector by suit, when protest against payment was duly made. But the court say, (13 Howard, 496): "Where no protest is made the duties are not illegally exacted." In this case, and in some seventy-five others from New York, represented by the same counsel, depending on the same principle, and involving a large amount of money, no such protest was made, and the importers have, therefore, no remedy against the collector; but they insist that the omission to protest ought not to impair their equitable claim for the return of the money by the government. The statements of the petitioner do not show a case for relief. If, as does not appear from his petition, he has suffered any loss, it is manifest that it proceeded entirely from his own negligence; and it will

impose on the government great expense, and be attended with great inconvenience to the current business, if practicable at all, to overhaul this immense amount of business, to ascertain the deficiency in each cask of liquor imported during the long series of years stated in the petition. It will require a minute collation of documents which represent a great portion of the vast transactions of the custom-house during this long period. No one has a right to impose such onerous labors on another to correct errors caused by a mutual mistake of the law. Mistake of the law is not sufficient ground for relief in equity: *Shotwell vs. Murray*, 1 John. C. R. 512; *Wintermute vs. Snyder*, 2 (N. J.) Green, ch. 489; *Good vs. Herr*, 7 Watts & Serg. 253. And when a party pays money under a mistake as to his legal liability on a contract, equity will not decree a restitution of it: *Jones vs. Watkins*, 1 Stewart, 81, Ala. The exceptions to this rule are few in number, are peculiar in their character, and involve other elements: *Hunt vs. Rousmanier*, 1 Pet. p. 15; *Same vs. Same*, 8 Wheat. 174; *Bank of U. S. vs. Daniel*, 12 Peters.

In the case of *Elliot vs. Swartwout*, 10 Peters, 154, the case of *Brisbane vs. Dacres*, 5 Taunt, 154, is cited with approbation, where the court lays down the doctrine broadly, "that where a man demands money of another as matter of right, and that other, with a full knowledge of the facts on which the demand is founded, has paid a sum of money voluntarily, he cannot recover it back. It may be, says the judge, that upon a further view he may form a different opinion of the law, and his subsequent opinion may be the correct one. If we hold otherwise, many inconveniences may arise. There are many doubtful questions of law; when they arise the defendant has an option either to litigate the question or submit to the demand and pay the money. But it would be most mischievous and unjust, if he who has acquiesced in the right should be at liberty, within the statutes of limitations, to rip up the matter and recover back the money." Many other cases are cited to the same effect by the court, and the court say, that even if the government could be sued, no suit would lie in such a case. But if, under ordinary circumstances, where a party shows that he has suffered actual loss, and the other derived corresponding advantages from a mistake of the law, he cannot recover, there is still less reason in these cases, where the parties have really suffered no actual loss, having reimbursed themselves by imposing all the duty upon the people who consume the article in the useful course of trade.

If it is contended that in these cases the importers may not have reimbursed themselves by exacting the duties with the same per-centage upon the amount as upon the original cost of the article from the consumer, because this the usual course of trade is not universal, and that sometimes importers meet with loss instead of profit on their merchandise, that circumstance does not affect the argument in this case, in which no such allegation is made; and we are to consider it as the common case, where it is known as a law of trade that the duty is considered part of the cost of the article in all after-dealings. Considered, therefore, as a claim addressed altogether to the liberality or equity of the government, does the importer show himself entitled to relief from the government, when he has been already reimbursed in his outlay

with a per-centage thereon for profit on his capital? It need not be argued to the court, that the importer, who is a mere factor between the producer and consumer, does not himself pay the duties. His is only the hand by which it is collected from others to pass to the government. Should it be determined by the courts that none of the duties heretofore collected by the government were legal, would it follow that the taxes to which the people of the United States have been subjected since the origin of the government were equitably due to the importing merchants and their legal representatives?

If these claims are countenanced, it will lead to mischievous consequences, and engender a vicious system of speculation on the government and people. Remove the limit now imposed by law, and these specious claims will start up on every revenue law which has been or can be passed. The amount involved will invite talent and industry to assail them. Combinations will be made to have duties refunded to the importers by the government after years of apparent acquiescence. It will offer bounties to trickery and fraud, and litigation, and tend to demoralize traders.

It is a question, therefore, of inaugurating a vicious and fraudulent policy against the present just and fair one, which offers comparatively little temptation to litigation, because, as long as the taxation is uniform, the duty which does not prohibit or seriously cripple trade is of little moment to dealers.

M. BLAIR.

STURGES, BENNET & Co. }

vs. }

THE UNITED STATES. }

Brief for Petitioners.

I. The petitioners claim that they have paid more money than the law requires to the collector of the port of New York, on making certain importations of liquor in casks, during the years 1847, 1848, 1849, 1850 and 1851, and that they are entitled to a return of the money thus overpaid.

1. Under the tariff act of 1846, *ad valorem* duties on merchandise imported into the United States are payable only on the quantity which actually arrives, and not upon the quantity which appears by the invoice to have been shipped. Duties can be lawfully imposed only on the amount actually brought into port, for that is all which is entered at the custom-house, goes into the consumption of the country, and comes into competition with our domestic manufactures. (*Marriott vs. Brune*, 9 *How. R.*, 632; *United States vs. Southmayd*, *Ib.*, 637; *Lawrence vs. Caswells*, 13 *How. R.*, 488.)

2. But the petitioners were called upon to pay, and did pay in the first instance, the full duties on the amounts which appeared by the several invoices to have been shipped; and were entitled, when the amount of actual imports and the amount of duties legally payable therefor were ascertained by the officers employed for that purpose by the government, to have the over-payment refunded to them by the Secretary of the Treasury, without protest. This results from the

just construction of the following enactments of Congress : (5 *U. S. S.*, 348:)

Chap. 82, sec. 2, act of 1839. *Be it enacted, &c.*, That from and after the passage of this act all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of the duties charged, shall be placed to the credit of the Treasurer of the United States, kept and disposed of as all other money paid for duties is required by law, or by regulation of the Treasury Department, to be placed to the credit of the Treasurer, kept and disposed of; and it shall not be held by said collector, or person acting as such, to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid; but whenever it shall be shown to the satisfaction of the Secretary of the Treasury that in any case of unascertained duties, or duties paid under protest, more money has been paid to the collector, or the person acting as such, than the law requires should have been paid, *it shall be his duty* to draw his warrant upon the Treasurer in favor of the *person or persons entitled to the over-payment*, directing the said treasurer to refund the same out of any money in the treasury not otherwise appropriated.

Section 21 of the act of 30th August 1842, (5 *U. U. S.*, 565,) provides: "That if, on the opening of any of the package or packages of goods, a deficiency of any article shall be found on examination by the appraisers, the same shall be certified to the collector on the invoice, and an *allowance* for the same be made in estimating the duties."

[It was held in *Brune vs. Marriott*, (*U. S. Cir. Ct. Maryland*, April, 1849,) that this section applied as well to groceries as to dry goods.]

[As the law stood prior to the act of 1839, the collector might have been sued for over-payments on unascertained duties, where no protest was made, as well as for duties paid under protest. *By the court*, in *Carey vs. Curtis*, 3 *How. R.*, 244.]

By the act of February 26, 1845, (5 *U. S. S.*, 727,) it was provided: "That nothing contained in 2d section of the act entitled 'An act making appropriations for the civil and diplomatic expenses of government for the year 1839,' shall take away, or be construed to take away, or impair the right of any person or persons who have paid or shall hereafter pay money, as and for duties UNDER PROTEST, to any collector of the customs, or other person acting as such, in order to obtain goods, wares or merchandise imported by him or them, or on his or their account, which duties are not authorized or payable in part or in whole by law; to maintain any action at law, against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury, touching the same, according to the due course of law. Nor shall anything contained in the 2d section of the act aforesaid be construed to *authorize the Secretary of the Treasury to refund any duties paid UNDER PROTEST*; nor shall *any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing, and*

signed by the claimant at or before the payment of said duties, *setting forth, distinctly and specifically, the grounds of objection to the payment thereof.*"

Section 2 of the act of August 8, 1846, (9 *U. S. S.*, 84,) authorizes the Secretary, "out of any money in the treasury not otherwise appropriated, to refund to the several persons entitled thereto such sums of money as have been *illegally exacted by collectors of the customs, under the sanction of the Treasury Department*, for duties on imported merchandise since the 3d of March, 1833: *Provided*, that, before any such refunding, the Secretary shall be satisfied, by decisions of the courts of the United States, upon the *principle involved*, that such duties were illegally exacted: *And provided, also*, that such decisions of the courts shall have been adopted or acquiesced in by the Treasury Department as its rule of construction."

Section 2 of the act of 3d March, 1849, (9 *U. S. S.*, 398,) provides, "That so much money as may be necessary for the payment of debentures or drawbacks, bounties and allowances, which are or may be authorized and payable after the day aforesaid, be and the same are hereby appropriated for that purpose, out of any money in the treasury, to be expended under the direction of the Secretary of that department, according to the laws authorizing said debentures or drawbacks, bounties and allowances."

II. All these acts recognise and proceed upon the fact, that there are some over-payments at the custom-house which should be refunded, without reference to protests. The act of 1839, in terms, draws the distinction between over-payments on unascertained duties and duties paid under protest. This is a legislative declaration, that where the duties are not ascertained, then no protest need be made, for the obvious reason that there is nothing to protest against.

The act of 1842 expressly requires, that in the case of an ascertained deficiency in any article imported, the collector should make an allowance for the same in estimating the duties. Here the government officers are made the actors throughout, and there is no call for a protest and no opportunity for one.

But it was decided by the Supreme Court, that the act of 1839 took away the action against the collector, and to remedy this difficulty, among other matters, the act of 1845 was passed. This act does not touch the question of "*unascertained duties*," distinguished in the act of 1839 from duties paid under protest, nor the *allowance for deficiencies*, specially provided for in the act of 1842; these were left as they stood under those laws. In these cases the government had the money, the goods, and the power of applying their own rules and regulations, through their own officers, in every instance. When the legal duties were ascertained, and when the deficiency, if any, was ascertained, it was made the duty of the Secretary of the Treasury, in the one case, to draw his warrant for any over-payment, and of the collector, in the other, to make an *allowance* for it in estimating the duties.

But there were some cases different and distinct from over-payments of unascertained duties, and from estimated allowances for deficiencies, in which a notice or protest had been sometimes resorted to, with the view of fixing the responsibility of the collector, and for no other rea-

son. (*Cary vs. Curtis*, 3 *Howard's R.*, 244; *Swartwout vs. Gihon*, 3 *Ib.*, 110; *Bank of United States vs. Bank of Washington*, 6 *Pet. R.*, 19.) The act of 1845 does not enlarge the class of cases in which the protest is called for; it does not give any new virtue to the protest, which never *creates* a right to recovery, but only operates on a right already existing; but it says, that in cases where a protest is made, it shall be of no avail against the collector, nor as authority to the Secretary of the Treasury to refund, unless it is *in writing*, and sets forth *distinctly and specifically* the grounds of objection to the payment of the duties in question.

Now it is clear enough, that in cases where the grounds of objection can be *distinctly and specifically* furnished ONLY by the government, on the ascertainment of facts by its own officers, a protest at the time of payment is impossible and useless; because it cannot be made distinct and specific, and because the government itself must ascertain and communicate to the importer the facts which establish its own liability, and on the ascertainment of which it is bound to *refund overpayments and make allowances*. The law makes it the duty of the government officers to refund and to make allowances, as soon as they ascertain the facts which *would enable the importer to make a distinct and specific protest*. Surely it never could have been the intention of Congress to enact, that when the government officers communicated to the importer the ascertained facts which affected them with certain duties, that they were released from those duties, unless the importer protested distinctly and specifically, in writing, that they ought to do what the law required of them.

But with all these exceptions, recognised by the acts of 1839 and 1842, and modifying the act of 1845, it was still found to work injustice by its call for a protest, and the second section of the act of 1846 was passed, applying, within certain limits, to *all cases* of illegal exactions, whether protest was made or not, and authorizing the Secretary to refund, wherever he shall be satisfied, by decision of the courts on the principles involved, that illegal exactions had been made. And the second section of the act of 1849 gave him the wherewithal to meet all the *allowances* authorized by law.

III. The practice of the Treasury Department, for a series of years, was based upon the view of these statutes which is here presented, and by which the petitioners were governed.

1st. The petitioners construed these laws as they were construed and acted upon by the Secretary of the Treasury, during the whole period within which their importations were made.

(a.) When the tariff of July 30, 1846, (9 *U. S. S.*, 42,) went into operation, viz: December 1, 1846, duty was taken on the value of deficiencies in importations of liquors and other merchandise. The Treasury Department afterwards, as per letter to the collector of New Orleans, of January 30, 1847, (9 *Howard*, 620,) considered that no such charge was authorized by law. The latter decision was suspended or reversed on March 24, 1847. (9 *Howard*, 621.) But the moneys collected at the port of New York, as for duties on deficiencies in importations of liquors, occurring between December 1, 1846, and March 24, 1847, were refunded without regard to protest having been made

or omitted. (*Vide* Treasury instructions of July 28 and September 3, 1847, in the case of E. Stevens' sons; of October 12 and November 6, 1847, in the case of S. T. Nicoll & Co.; of December 24, 1847, and March 15, 1848, in the case of John Durand & Co.; of January 10 and March 2, 1848, in the case of Hilger & Co., &c., &c.)

(b.) Under the 2d section of the act of August 8, 1846, above cited, the Secretary of the Treasury has considered that he had the power to refund duties not paid under protest, in case it was ascertained, by decisions of the courts of the United States upon the principle involved, that the duties had been illegally exacted; and such power has been frequently exercised.

Vide Treasury circular of 13th November, 1847, (1 *Mayo*, 371,) and Treasury letters of May 7 and July 21, 1847, therein referred to; Treasury circular of August 10, 1850, (1 *Mayo*, 49, appendix,) ordering the refunding of the duties exacted on deficiencies in importations of sugar and molasses, under which circular a very large amount of money, not paid under protest, was refunded; Treasury letter of June 14, 1851, to the collector of Baltimore, ordering the refunding of duties illegally exacted on glazed calf-skins, seeds, and vermilion, "without reference to protest against the rate of duty charged;" Treasury letters to the collector of New York of August 29, 1851, in relation to linen cambric handkerchiefs; of December 24, 1851, in relation to the depreciated currency of Austria; and of April 21, 1852, in relation to goats' hair or mohair plush.

2d. The Treasury Department's construction of the 2d section of the act of August 8, 1846, to the effect that it directs the return of duties illegally exacted, "without reference to protest," was doubtless correct; the act of March 3, 1839, above cited, already made it "the duty" of the Secretary of the Treasury to refund illegal "*duties paid under protest*." This enacted something more, and the courts must so interpret it, or treat it as vain and superfluous legislation.

(c.) The Treasury Department has continued to act upon this construction of the law in certain cases, and has ordered payment of numerous claims for duties where there was no protest.* But it still refuses to refund our over-payments, or to make any allowances for the deficiencies in our importations, though they have long since been ascertained and estimated for. (Senate Doc. 153, 28th Cong. 2d sess., pp. 26, 47, 51, 53.)

But not only has it found the authority to refund moneys paid without protest in the acts above cited, but also in the 2d section of the act of October 16, 1837, which authorizes the Secretary of the Treasury to pay such things as are charges upon the revenue without requiring protest, and the allowances in question are such charges. (See Treasury Circular of August 10, 1850; Report on the Finances, December 4, 1854, page 74.)

It is the present practice of the government always to take duty on the invoice quantity, and when the deficiency is ascertained, to make the proper allowance, without requiring a protest.

The 2d section of the act of 1839 has been also understood by the Treasury Department to authorize the return of illegal duties not paid under protest, when the *rate* of duty has not been ascertained with

certainty. "You are instructed to return as *unascertained duties*, in the manner directed by the act of Congress, approved 3d March, 1839, any excess of duty that you may have exacted on imports manufactured in whole or in part from steel or iron," &c. (Letter of First Comptroller, August 23, 1843.)

IV. Under the foregoing statutes, and decisions bearing on them, we claim from the United States the repetition of our money as a charge upon the revenue, (act of 1837,) as an over-payment of unascertained duties, (act of 1839,) or as money illegally exacted, (act of 1846,) or as an allowance ordered to be made, (act of 1849,) in estimating the duties, where a deficiency is ascertained to exist on examination by the appraisers.

If this money is found to be due and payable under any of these statutes, then the court will of course so certify to Congress, with the necessary bill for the relief of the party. But if the court should find that we are not thus entitled, then it will consider whether or not we are entitled, under any contract, express or implied, with the government of the United States, and calling for the passage of a new law.

And, first, there is a contract arising from the provisions and limitations of the constitution. That is an express contract of each individual with all the rest, and of all the people with the government they thereby establish, that taxes shall be uniform, and that individual property shall be secure to the owner.

There is an express contract that the executive officers shall raise from the people such taxes as the legislature shall authorize, and no other; and on the part of every individual there is a contract to pay just such taxes and none other. There is an *implied* contract arising from the guarantee of my property, not only that the government will not take it from me by fraud or force, but that if it comes into possession of it under circumstances that would work a violation of the constitution to my injury, it will make restitution. For as the government cannot, under the constitution, directly deprive me of my property without compensation, it cannot do it indirectly by taking it under color of official authority without making restitution, whether it has proceeded in mistake of law or in mistake of fact.

The constitution provides (article 1, section 8) that "Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defence and general welfare of the United States, *but all duties, imposts and excises shall be uniform throughout the United States.*"

It provides, also, (article 5 of amendment) that no person shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

The section 8 does not mean merely that imposts shall be uniform as far as places are concerned—to wit, uniform in Massachusetts and in Louisiana—but uniform, also, as far as *individuals* are concerned—to wit, that A shall pay the same duties as B, and none other.

It is the duty of every department of the government so to discharge its functions as to secure the great results contemplated by the organic law. Congress should so frame its statutes, the Executive should so administer them, and the judiciary so construe and inter-

pret them, that the great ends which the constitution is manifestly intended to attain should be secured. Perfect uniformity in taxation, and perfect inviolability of private property, are two great constitutional provisions, which no department can directly violate, and which no department ought to violate by indirection; but both are violated if, on any pretence, more duties are exacted from A than from B for the same amount of imports; or, if duties are exacted from A which he did not legally owe, and the property of A, which, by misconstruction of law, has come into the treasury of the United States, can be appropriated to the public use without just compensation. (12 Peters, 72.)

V. When the government permits itself to be impleaded, as in this court, it submits to consider itself as affected, like other defendants, by moral obligations, equities and duties.

For all legal purposes, in the relation to rights and duties, the civil law regards the *fiscus* as a moral person. (1 *Kaufman's Mackeldy*, 149.) It is only by so regarding it that we can suppose the government of the United States to be affected by implied contracts, and amenable to the general principles which govern such contracts. Thus regarded, it is liable to make restitution to the plaintiffs, on the general principles of law which govern the action for money had and received.

The grounds on which this action may be maintained are thus stated by the court, in the case of *Cary vs. Curtis*, 3 *How.*, 249:

"We will now recapitulate the principles on which the action for money had and received may be maintained. They are these: 1st. *Whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged, by the ties of natural justice and equity, to refund.* 2d. In the case of an agent, when such agent is not notoriously the mere carrier or instrument for transferring the fund, but has the power of retaining, and before he has paid over he received notice of the plaintiff's claim, and a warning not to part with the fund. 3d. Where there exists a privity between the plaintiff and the defendant." (See *Edwards vs. Bates*, 7 *M. & G.*, 598.)

This doctrine of the court, as announced by DANIEL, J., is a reaffirmance of the principles laid down by Lord Mansfield, in *Moses vs. McFarlane*, *Burr.*, 1012. Of this case an eminent judge (Thompson) says, (4 *John R.*, 250,) that its principles are derived from the juridical wisdom of the civil law, and are founded on the immutable rules of justice and moral honesty. The Supreme Court allude to it and reaffirm it by name in *Bend vs. Hoyt*, 13 *Pet. R.*, 269; and *Cary vs. Curtis*, 3 *How.*, 246.

In the latter case they say, further, (*ib.*, 250) "We all know that this action for money had and received is founded upon what the law terms an implied promise to pay what in good conscience the defendant is bound to pay to the plaintiff. It being in such case the duty of the defendant to pay, the law imputes to him a promise to pay. It was upon this principle that the action for money had and received was sustained in the case of *Elliott vs. Swartwout*. There money had been taken by the collector for duties which were not imposed. The money lawfully belonged to the plaintiff. It was the duty, therefore, of the collector to pay it back to him."

The court held in this very case, (and also in *Swartwout vs. Gihon*, 3 *How.*, 110,) that the notice or protest was of no further use than to warn the collector of an intention to hold him personally responsible. The money paid for duties which were not imposed lawfully belonged to the plaintiff, and that with or without notice; they were, therefore, unlawfully exacted or retained by the collector, and it became his duty to pay them back.

Lord Mansfield, in *Bize vs. Dickason*, 1 *T. R.*, 285: "If a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. So where a man has paid a debt which would otherwise have been barred by the statute of limitations, or a debt contracted during his infancy, which in justice he ought to discharge, though the law would not have compelled payment, yet the money being paid, it will not oblige the payee to refund it. But where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again by this kind of action."

The Supreme Court, (per STORY,) in 13 *Pet.*, 269, says of *Bize vs. Dickason*: "Now, admitting the entire correctness of this [its] doctrine to the full extent, (and no more than general truth can be imputed to it, it leaves the whole matter open upon which the present controversy tends, and that is *whether there is any want of conscience in the collector's retaining the money.*"

So THOMPSON, J., says, of the same case: "The true doctrine on this subject is laid down in the case of *Bize vs. Dickason*, 1 *T. R.*, 286." After quoting *ut supra*, he says: "If this be the true rule—of which I think there can be no doubt—the plaintiff has a right to recover back the money in this case."

In *Sadler vs. Evans*, the court say, it is a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money. *The defence is any equity that will rebut the action.* (4 *Burr.*, 1766.)

"When money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation to refund it. A notice of intention to recover the money back does not, even in such cases, create the right to recover it back: *that results from the illegal exaction of it*; and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake." (*B. of U. S. vs. B. of Washington*, 6 *Pet. R.*, 19.)

Judge STORY, in his elementary book on Agency, section 394, thus lays down the result of the cases:

"When, however, money is obtained from third persons by public officers illegally, but under color of office, it may be recovered back again from them, if notice has been given by the party, at the time, to the officer, although the money has been paid over to the government; and if it has not been paid over, but it remains in the officer's hands, it may be recovered back, even without notice. And it will make no difference in the case that the payment was originally made under

a misconception or misconstruction of the law, by both or by either of the parties.”

To illustrate this, I refer to what he says in 3 How., 253 ; McLean, J., 262.

Now we contend that under these authorities we are entitled to the repetition of this money, which is admitted to be ours, unless the United States can set up some substantial *equity* to bar the action. They may set up—

First. The absence of protest. We deny that this is any answer in equity, or even in strict law.

It is an answer in law and in equity for an endorser to set up want of *notice* of non-payment by the maker. It is an answer for a known agent, who has paid over to his principal money paid to him by mistake of law or fact, that he has paid it over without notice.

But neither of these answers avails, in law or equity, the maker of the note, or the principal who has received the money that belongs to some one else.

The reason that the endorser and agent are discharged by the want of notice is, that it may affect their relations to the parties or their funds. The agent might have held on to the money ; the endorser might have secured himself on the property of the maker. This was dwelt upon by the court, in *Bend vs. Hoyt*. The relation of the United States to the property, and the evidence of it, had been changed—by a mistake of fact, arising from the culpable negligence of the plaintiff—and therefore, it was held that it was not unconscientious in the United States to retain the money. They had parted with the means of settling the question for themselves by inspection. Nothing of all this arises in this case. We proceed entirely on the government's own evidence. The government, since the over-payment, has, by its own officers, ascertained that we have paid duties on goods that we never imported, and we claim that we are entitled to a repetition of the non-payment, or an allowance for the deficiency ; or, in other words, a return of our money, which the government has in its hands.

Second. The second equity that may be set up is, that this is a *voluntary payment* or gift on the part of the plaintiff, and therefore not liable to repetition.

This monstrous legal fiction, or falsehood of law, can never be regarded by this court as a *substantial rebutting equity*. But in a case like the present, it is no answer even in law.

Story's Agency, sec. 394, and cases cited in note ; *Comb.* 447 ; *Astley vs. Reynolds*, 2 *Str.*, 915 ; *Willes*, 536 ; 2 *Sid.*, 4 ; *Lofft.*, 753 ; 1 *B. & P.*, 139 ; *Shaw vs. Woodcock*, 7 *B. & C.*, 73, 84 ; *Irving vs. Wilson*, 4 *T. R.*, 485 ; *Smith vs. Bromley*, *Doug.*, 696 ; *Salk.*, 22, *pl.* 2 ; *Ashmole vs. Wainwright*, 2 *Q. B.*, 845, 6 ; *Valpy vs. Manly*, 1 *C. B.*, 602, 603 ; *Dew vs. Parsons*, 1 *Chitty R.*, 295 ; 2 *Barn. & Ald.*, 562 ; *Morgan vs. Palmer*, 2 *B. & C.*, 735.

The maxim, *volenti non fit injuria*, holds only in cases where the party has a *freedom of will*, which he has not in transactions of this nature with the government. *Velle non creditur qui obsequitur imperio patris vel domini*. *Poth. Reg. Ju.*, viii, 3. *Coacta voluntas non habetur pro voluntate*.

In *Shaw vs. Woodcock*, 7 *B. & C.*, 73, Holroyd, J., says: "Where the question is whether a payment be voluntary or not, the law is quite clear. If a party making the payment is obliged to pay, in order to obtain possession of things to which he is entitled, the money so paid is not a voluntary but a compulsory payment, and may be recovered back; and if the plaintiff below was compelled to make the payment in question, in order to get the policies of insurance, whether there was a pressing necessity or not, he has a right to recover it back."

In *Smith vs. Bromley*, *Douglas*, 697, Mansfield, J., speaks of the absurdity of the misapplication of *volenti non fit injuria*, in the case of the man who *pays from mere necessity more than the other can in justice demand, and who is called, in some books, the slave of the lender*. 1 *Holt R.*, 126; *Geralds vs. Donison*.

See, also, *Parker vs. Great Western Railway*, 7 *Man. & Gr.*, 293; *Close vs. Phipps*, *Ib.*, 586; *Pitts vs. Coomes*, 2 *Ad. & El.*, 460; *Snowden vs. Davis*, 1 *Taun. R.*, 362; *Carter vs. Carter*, 5 *Bing. R.*, 408; 3 *Sumner*, 387.

Third. It may be set up as a rebutting equity that the money has been exacted by the government in mistake of the law, and is therefore not liable to repetition.

The argument then must be, that the United States have misconstrued the law to the injury of the petitioners and to their own advantage, and it is, therefore, equitable that they should keep the petitioners' money.

Now this money, if exacted and retained without law, is wrongfully and illegally exacted and retained. *Ignorantia legis neminem excusat*. If any man violates the law he must be held to violate it intentionally, because he cannot set up ignorance as a defence in a civil or criminal action. Then comes in the principles of law: "*Nemo ex suo delicto meliorem suam conditionem facere potest*." (*Poth. Reg. Ju.*, xxxiv.) "*Error facti ne maribus quidem in damnis vel compendiis prodest: Juris autem error nec feminis in compendiis prodest. Cæterum omnibus juris error, in damnis amittendæ rei suæ non nocet*." (*D. 22, 6 de Jur. et fac. Ig.*) "*Juris ignorantia non prodest acquirere volentibus; suum vero petentibus non nocet*." (*l. 7, ff. d. tit.*) "*Hoc natura æquum est neminem cum alterius detrimento fieri locupletiores*." (*l. 14, de Cond. Indeb. D. 12, 6.*)

Suppose there was a *mutual ignorance* in this case, both of the facts and the law. It is well settled that the money thus paid is liable to repetition. But supposing the mistake to be merely one of law, the better opinion now is, that money paid under a mistake of law, which there was no natural obligation to pay, may be recovered in an action for money had and received. This is the inevitable consequence of the principles regulating this action, as laid down by the Supreme Court in the cases cited.

Ancher vs. Bank of England, *Douglas*, 638; *Bize vs. Dickason*, 1 *T. R.*, 285; *Farmer vs. Arundel*, 2 *Black. R.*, 824; *Chatfield vs. Paxton*, *Chitty on Bills*, 102; *Perrott vs. Perrott*, 14 *East*, 439; *Lansdown vs. Lansdown*, *Moseley*, 364; *Haven vs. Foster*, 9 *Pick. R.*, 117; *Hunt vs. Rousmanier*, 8 *Wh. R.*, 174; *Lawrence vs. Beaubien*, 2 *Bailey S. C. R.*, 623; *Fitzgerald vs. Peck*, 4 *Litt.* 125;

Lamah vs. Rowley, 6 *Harr. & John.*, 500; *Lowndes vs. Chisden*, 2 *McCord's Ch. R.*, 455; *Hopkins' Ex'r vs. Maryck*, 1 *Hill's Chan. R.*, 151.

Money paid by a collector in ignorance, misconstruction or disregard of an act of Congress, has been recovered back by the United States in an action for money had and received. (*United States vs. Bartlett, Davies*, 1.)

See opinion of *Chambre, J.*, *Brisbane vs. Dacres*, 5 *Taun. R.*, 144; and that of *Senator Paige*, in *Chaplin vs. Layton*, 18 *Wend. R.*, 422, and cases there cited. *Cooper's Justinian*, pp. 245, 292, 543, *in note*.

And see a very able and conclusive review of the subject and the cases in *Northrop vs. Graves*, 19 *Conn. R.*, 548; the doctrine of which is re-affirmed in *Stedwell vs. Anderson*, 21 *Conn. R.*, 139.

See 2 *W. D. Evans's Pothier on Obligations*, 336 to 339. *Code Civil Tit. 4, Livre 3, Article 1376*. 1 *Motifs, &c., du Code Civil*, 521, 514, 516. 2 *Ib.* 506. *Dig. B.*, 39; *Tit. 4, Div. 16, paragraph 14*.

Fourth. It may be contended that the allegation of *laches* is a rebutting equity in regard to the omission of protest.

We have already cited the cases in which the Supreme Court has said that the only object of the protest is notice to the agent, and that the liability of the principal arises, *not* from the protest, but from the illegal exaction. It has been so held, also, by committees of the legislative departments.

The Committee on Finance of the Senate (29th Cong., 1st Sess., Rep. 320) says: "In all cases where a greater amount of duty has been exacted upon foreign imports than was authorized by law, the excess ought to be refunded. It is not material to the action of Congress whether the payment was accompanied by a protest or not. The original wrong was in the exaction of a duty not authorized by law; and it is not to be presumed that the importers paid the excess voluntarily; and, even if they did, upon discovery of the error, it ought to be corrected."

So the Treasury Department has taken the same view, in a letter to the collector of New York, of October 7, 1844: "It being the opinion of the department that, whether paid under protest or not, the claimant is equally entitled in justice and equity to the return of duty illegally demanded and paid."

So in the following extract from "Report of the Secretary of the Treasury on the state of the Finances," dated January 15, 1853, 32d Congress, 2d Session, Senate Ex. Doc. No. 22, p. 19:

"The Supreme Court, in the case of *Lawrence vs. Caswells*, decided that no return of duties could be claimed by parties who had not, at the time of making the entry, entered a written protest declaring specially the grounds on which they objected to pay the duties; and the department has *felt itself bound by that decision*, and has since declined to refund any duties alleged to be illegally assessed, except in cases where such written protest was made at the time, or where it evidently arose from a clerical error. This course involves *great hardship in many cases*, where even the same parties having in

certain entries made a regular protest, have received back the duties erroneously assessed, agreeably to legal decisions; while in other cases, precisely similar in every respect, but where the formality of a protest was not observed, no return can be made under the above decision of the Supreme Court. I would recommend these cases to the favorable action of Congress, by investing in the Treasury Department the power to return duties in all cases which may be similar to those on which the Supreme Court may have made decisions in favor of the claimants, even if no protest has been made at the time by the parties."

This extract shows the judgment of the Treasury Department in regard to the equities involved in the case before the court, though it takes an erroneous view of the decision of the court in the case of *Lawrence vs. Caswells*. For, though it was held in *Mason et al. vs. Kane*, that the duty illegally exacted could not be *recovered of the collector at law*, because of the insufficiency of the protest, the court remarked: "If improperly charged, it is no doubt yet in the power of the *administrative department* to do justice to the claimant." (U. S. Cir. Ct., Maryland Circuit, April term, 1851.)

VI. The parties who have paid excessive duties are entitled to the return of the same, and are the only parties entitled thereto; and have been so uniformly regarded by all the departments of the government.

(a.) The 2d section of the act of March 3d, 1839, directs the refunding of illegal duties to the parties "entitled thereto." And the Treasury Department has always paid the importer or owner, deciding that he was the party entitled under the law, and it has never paid any other party. (*Vide* Treasury Circular, November 13, 1847.)

(b.) The act of February 26, 1845, requires that the importer, or party who pays illegal duties, should protest against the exaction, and authorizes him only to maintain an action for the recovery of the same, thus recognising the importer as the only legal claimant.

A consumer, who obtains possession of merchandise after it is imported, cannot make a valid protest against the charge of illegal duties, or maintain any action for the recovery of the same.

(c.) The 1st section of the act of August 8, 1846, directs the refunding of duties illegally exacted to the importers of the merchandise on which the duties were taken, naming them, and without reference to any other parties.

(d.) The 2d section of the act of August 8, 1846, authorizes the Secretary of the Treasury to refund duties illegally exacted "to the parties entitled thereto;" and such refunding has always been made to the consignee or owner of the merchandise. (*Vide* Treasury Circular, November 13, 1847. See, also, 6 *U. U. S.*, 22, 212, 234, 237, 240, 263, 268, &c.; 5 *Ib.*, 489; 9 *Ib.*, 662, 720, 743, &c.)

(This circular, of November 13, 1847, intimates a doubt in the Secretary's mind as to the soundness of the policy of the law which gives back to the importers duties illegally exacted, instead of paying them to the unexpected consumer; but, nevertheless, directs that the importer be the recipient of the same.)

(e.) The circuit courts and the Supreme Court of the United States

have, in numerous cases, decreed the return of illegal duties to the importers who had paid the same.

There is no instance in which the duty has been refunded to any other than the person from whom it was exacted.

VII. The practice in assessing duties at all the ports of the United States, since June 14, 1851, in conformity with Treasury instructions of that date, (1 *Mayo*,) has been to make such allowances as are now claimed on all articles imported.

Prior to that time, and subsequently to July 5th, 1850, in conformity with the Treasury circular of that date, (1 *Mayo*,) such allowances were made only on importations of sugar and molasses.

JOHN O. SARGENT,
CHARLES ABERT,
of Counsel for the Petitioners.

BRIEF OF THE UNITED STATES SOLICITOR.

I submit in this case my brief in the case of John Durand & Co., which was prepared prior to the reception of the brief by counsel of claimants in this. In addition, and as reply to the brief of claimants' counsel, I submit the following considerations which have been furnished by the Secretary of the Treasury in reply to inquiries addressed to him by me:

1. It is not disputed by this department that spirituous liquors are liable to duty by law upon the quantity actually imported. The practical question always presents itself in carrying out this principle, How is this quantity to be ascertained?

Under the act of 1842, which imposed a specific duty on each gallon of liquor imported, the quantity was ascertained by gauge, and duty assessed accordingly. When the act of 1846, now in force, went into operation, which imposed the duty of 100 per cent. *ad valorem* on such liquors, the practice at all the ports of the United States was to take the quantity expressed in the invoice, being the basis of all computation of duties under that act, and deduct 2 per cent. for leakage under the act of 2d March, 1799, and charge duty upon the quantity so ascertained. The casks still continue to be gauged, ostensibly for the purpose of ascertaining that frauds were not committed in the invoice quantities, though the main purpose of the gaugers was to entitle themselves to their fees until the circular of 14th July, 1851, was issued, directing duty to be charged on the quantity shown by the gauge.

Under the existing act of 1846, there have been at different periods, therefore, two modes of ascertaining the true quantity of spirituous liquors subject to duty. The first, which prevailed up to 14th July, 1851, was to take the quantity claimed by the importers to have been shipped, making the legal allowance for leakage, and charging duty on the balance. The second, which has prevailed since 14th July, 1851, is to charge duty on the quantity returned by the gaugers.

Which of these two modes is the most correct may be regarded as

a matter of speculative opinion. It has been long well known that important changes in the apparent bulk of spirituous liquors are occasioned by either atmospheric or electrical influences, or both combined, which has always made the settlement of the true quantity in casks at different times, if not impossible, certainly a question of great practical difficulty. In foreign countries, particularly in Great Britain, where the duties assessed on wines and spirits are much higher than in this country, this subject has of late attracted much attention. Several curious statements in regard to it may be found in the evidence reported by the commissioners on the custom revenue in 1851 and 1852, published in the Parliamentary Reports, which may be found in the State Department. It appears that a cask of liquor, according to the gauge, on one day may be found several gallons deficient, and on a subsequent day, by the same process, found to contain an excess, and that some of these discrepancies of quantity cannot be satisfactorily explained or accounted for by any known principle. It is obvious that these questions of deficiency should be settled at the time, it being impossible to decide them fairly at any subsequent period. This consideration gives great force to the decision of the Supreme Court of the United States in the case of *Lawrence vs. Caswell*, 13th Howard, 496, so far as the duty on liquors is concerned. Chief Justice Taney says in that opinion that "where no protest is made, the duties are not illegally exacted in the legal sense of the term." In such cases, unless objection and protest is made at the time the duties are assessed, the parties should be forever concluded. When the duties were paid upon the liquors imported by Sturges, Bennet & Co., which are the subject of the present claim, being considerably more than three thousand casks between the 22d April, 1847, and the 8th April, 1851, they made no objection to taking the invoice quantity, deducting the legal allowance for leakage, as the quantity on which duty was chargeable, though they were fully apprized at the time when the duty was paid that the casks had been gauged, and the quantity returned was not precisely the same.

The custom-house returns of the importations of spirituous liquors where the return of duty is claimed have only been furnished to this department in this case of Sturges, Bennet & Co. There are about forty importations by different vessels, amounting, as before stated, to upwards of three thousand casks. It would be tedious, as well as useless, to go into the details which strikingly illustrate the difference of gauge as compared with the invoice quantities at different seasons and temperatures. As an instance: On the 20th September, 1849, they imported forty-five casks of brandy from Bordeaux by the *Sunny Eye*, which were invoiced at 2,863 gallons; the gauge returned is 2,859 gallons, being a deficiency of four gallons in this large amount. On the 7th December, 1849, they imported fifty-five casks of brandy from the same place by the *Prescott*, which were invoiced at 2,646 gallons, while the gauge returned is 2,621 gallons, showing a deficiency of twenty-five gallons in a less quantity; the one invoice having been gauged in warm, and the other in cold weather, as would seem from the dates stated.

2. Upon these facts the claimants are not authorized to assert that

they have paid duty upon a larger quantity than was actually imported. The mode of ascertaining the quantity upon which duty was charged was perfectly well known to them when they made the payments, and they assented to that mode by making payment without objection.

It is, therefore, an assumption not warranted by the facts, to state that there was any over-payment of duty in this case. Had the duty been assessed on the quantity returned by the gauger, a slightly smaller amount of duty would have been payable; but whether such quantity would have been nearer the true quantity of liquor imported, is a matter of opinion which has been conclusively settled by the assent of the importer at the time.

A few remarks will dispose of the bearing of the several acts of Congress quoted.

The second section of the act of 1839 applies only to unascertained duties, and duties paid under protest. These duties were not only ascertained upon the invoices, deducting leakage, without objection, but were paid without protest.

The 21st section of the act of 1842 obviously, according to all commercial usage, refers only to packages of dry goods, including sugars, as in the case of *Brune vs. Marriott*.

The act of 1845 expressly requires written protests to entitle the claimant to return of duty.

The act of 1846 authorizes the Secretary to refund moneys illegally exacted by collectors, provided they have been decided by the courts of the United States to be illegal. Nothing of the kind has been so decided in regard to these claims; of course, they neither can be brought within that act, nor the quoted act of 1849.

II. It may, perhaps, be asserted, that some of these acts recognise payments of return duties without protest, but only in cases where such duties have been judicially settled to be illegal. The act of 1842, as to packages of dry goods, has no bearing on casks of liquor. The act of 1839 refers, no doubt, to *unascertained* duties, as a distinct class from duties paid under protest. But what are the unascertained duties here referred to? A brief explanation of the general course of transactions at the custom-houses will show the propriety of this provision, as well as that it has nothing to do with the present claim.

An importer enters an importation of merchandise at the custom-house, and expresses a desire to receive it into his own custody as soon as the several packages or casks have passed through the hands of the proper officers. He exhibits his invoices, upon which an estimate of the probable amount of duty is made, which is paid at once in a gross sum before any examination is made. The goods are then sent to the appraisers for examination, with the invoices, and as fast as they are examined they may be delivered to the importer. After such examination the duty is ascertained. Instead of paying duty on each package as examined, and the duty ascertained, which would create vast trouble and delay, he has paid beforehand a gross sum on account of such duty, which is meant by the term *unascertained duties*. When the examination and verification of the importation is completed, the duties are computed thereon and ascertained. If his previous payment

on account of unascertained duties exceed the sum ascertained, he is entitled to the overplus. This act provides that no such payment on account of unascertained duty shall conclude the right of the importer to dispute the correctness of the duties charged when ascertained; and properly, for otherwise the importers would not pay on estimate beforehand, to the great convenience and despatch of business.

The present claim is not, therefore, for unascertained duties—the duty having been ascertained and paid at the time of importation as in other cases. The argument, that the act of 1845 extends to such a case as the present, is simply founded on misapprehension of the term *unascertained* duties.

The position stated on the fourth page of the brief—that where the objection can only be furnished by the officers of the government, no protest is necessary, whether it can be reconciled with the decisions of the Supreme Court in the case of *Lawrence vs. Caswell*, or not—clearly has no application to the present case, as the facts are entirely at variance with the grounds stated.

When the importer of the liquors in question came to the custom-house to settle the duties as liquidated and ascertained, a statement, showing the facts upon which the duty on the importations had been computed, was presented to him for examination, if he so desired. The collector could not compel him to pay the duty on any one of these forty importations blindfold. The importer knew at that time, or might have known, had he so chosen, the quantity of liquor stated in the invoice, the allowance made for leakage, and the quantity returned by the gaugers. The whole facts were before him on which to make a distinct and specific protest, had he been advised to claim that duty was only payable on the latter quantity. His position was like that of all other importers where duty is demanded by the collector. Should the party believe any charge to be illegal, either in respect to classification or mode of computing the quantity, or on any other ground, he may save all his rights by a specific protest in writing. Such is the law. But here the duty was paid without objection; and in the words of Chief Justice Taney, in the case before referred to, “where no protest is made, the duties are not illegally exacted in the legal sense of the term.”

III. The cases referred to under this division of the brief, of duties refunded without protest, were all within the authority of the act of 8th August, 1846. But no decision of any court of the United States has been cited or produced, showing the mode of charging duty in the present class of claims to be illegal.

The circular of 10th August, 1850, directing certain duties paid on sugar and molasses to be returned, points out the specific decision upon the authority of which the order was given, and all the cases referred to under this head belong to a different category from the present. These duties were refunded without protest, upon judicial decisions that the duties were illegal. When these claimants shall produce such a decision, the department will take the proper course.

The most extraordinary reference is that made to the act of 16th October, 1837. Upon the sudden stoppage of the accruing revenue, on the general suspension of the banks during that year, it was found

impossible to pay debentures and other charges, which previously had been paid out of public money before it went into the treasury. It became, therefore, necessary to authorize such payments to be made from the treasury, in order that treasury notes, and such other means as were at the command of the treasury, might be applied. Whatever authority was given to the Secretary of the Treasury by that temporary law, it clearly was not intended to authorize him to direct payments which had not been before recognised; and it was superseded by the act of 3d March, 1849, which directs the gross revenue to be paid at once into the treasury.

It is perfectly obvious that these claims are not allowable under any existing law. There being no protest, they are not within the act of 26th February, 1845.

There being no decree of any court of the United States deciding the principle that duties paid under the facts in these cases are illegal, they are not within the act of 1846. The petition admits this, but suggests that "*the authority of your honorable court is not limited by the provisions of the said act of February 26, 1845, or any other law restricting the power conferred on the Secretary of the Treasury.*" The equitable rights of claimants will not be disregarded by the court when they are shown; but I contend that there is nothing shown in these cases which should move the court to go beyond the law in their favor.

M. BLAIR.

STURGES, BENNET & CO. vs. UNITED STATES.

The opinion of the court was delivered by Judge Scarburgh.

In this case the petitioners allege that, during the years 1847, 1848, 1849, 1850, and 1851, they imported into the United States certain quantities of bandy and other liquors, in casks, and paid duties thereon at the rate of one hundred *per centum*, not only on the value of the quantity of liquor ascertained by gauge to be contained in the casks, but also on the value of the quantity of liquor which had leaked out of the casks on the voyage of importation; and that they claim a return of the moneys exacted from them as import duties on such leakage or non-imported liquors.

The petitioners refer in their petition to a certified statement prepared by the collector of New York, by order of the Secretary of the Treasury, for a particular account of their claim. From this statement it appears that, under instructions of the Secretary of the Treasury, the duties upon their importations were levied according to their invoice value, without reference to deficiencies, unless arising from accident at sea. It was conceded, in the argument submitted in this case, that the leakage arose, not from any accident at sea, but from other causes, and that the deficiency was ascertained from the return of the gaugers.

The act of Congress entitled "An act reducing the duty on imports, and for other purposes," approved July 30, A. D. 1846, imposed a duty of one hundred *per centum ad valorem* on brandy and other spirits

distilled from grain, or other materials imported from foreign countries. According to the principles settled by the cases of *Marriott vs. Brune*, (9 How. R., 619,) the *United States vs. Southmayd*, (Ibid. 637,) and *Lawrence vs. Caswell*, (13 How. R., 488,) this duty is imposed, not upon the quantity of brandy which may have been purchased abroad, but upon the quantity which actually arrives in this country.

In the case of *Marriott vs. Brune*, duties had been imposed upon importations of sugar and molasses made after the act of 1846, according to the invoice quantity; but the report of the weighers and gaugers showed a deficiency between that quantity and the quantity actually imported. Mr. Justice Woodbury, who delivered the opinion of the court, said: "The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here; that is, what is *imported*—for nothing is imported till it comes within the limits of a port. (See cases cited in *Harrison vs. Vose*, 9 Howard, 372.) And by express provision in all our revenue laws, duties are imposed only on imports from foreign countries; or the importation from them, or what is imported. (5 Stat. at Large, 548, 558.) The very act of 1846, under consideration, imposes the duty on what is "imported from foreign countries." (p. 68.) The constitution uses like language on this subject. (Art. I, secs. 8, 9.) Indeed, the general definition of customs confirms this view; for, says McCulloch, (vol. I, p. 548,) 'customs are duties charged upon commodities, upon their being imported into or exported from a country.'

"As to imports, they, therefore, can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom-house; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufactures; and we are unable to see any principle of public policy which requires the words of the act of Congress to be extended so as to embrace more.

"When the duty was specific on this article, being a certain rate per pound, before the act of 1846, it could of course extend to no larger number of pounds than were actually entered. The change in the law has been merely in the rate and form of the duty, and not in the quantity on which it should be assessed.

"On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad whenever it does not all reach the United States, or we shall in truth assess here what does not exist here. The collection of revenue on an article not existing, and never coming into the country, would be an anomaly, a mere fiction of law, and is not to be countenanced where not expressed in acts of Congress, nor required to enforce just rights."

The same doctrine is directly applied to importations of brandy, in the case of *Lawrence vs. Caswell*.

It is, moreover, held in these cases, that the quantity actually imported is to be ascertained by the gauger's return. In the case of *Lawrence vs. Caswell*, the question whether the duty ought to be com-

puted on the quantity stated in the invoices, or on the contents as ascertained by the gauger's return, was, *in terms*, considered by the court, and the decision was, that the duty ought to be computed on the latter, and that this question was substantially the same with that decided in the case of *Marriott vs. Brune*. It may be true, as suggested by the solicitor, that there is no mode in which the quantity imported can be ascertained with absolute certainty; but there can be no doubt, we think, that the decision of the Supreme Court, recognising the measurement by gauge, as the proper legal method for that purpose, is in conformity both to the acts of Congress and to the usage of the government of the United States, for more than half a century.

It is apparent, therefore, that the duties now sought to be reclaimed were paid upon brandies not actually imported, and consequently that they were not imposed by law. If, therefore, the petitioners be not entitled to relief, it is not because they have not paid the United States money which the acts of Congress did not require them to pay, but because they paid it under such circumstances as took from them the right to require its repayment.

Prior to the act of March 3d, A. D. 1839, an importer might maintain an action for the recovery of an excess of duties, or for the recovery of duties illegally exacted, against a collector in two classes of cases; (1) where the payment was made for unascertained or estimated duties; and (2) where it was made under protest. These two classes are distinctly recognised by Daniel, J. In the opinion delivered by him for the majority of the court, in the case of *Carey vs. Curtis*, 3 How. R., 241, he said: "It will be remembered that the two principal cases in which collectors have claimed the right to retain, have been those of unascertained duties, and of suits brought, or threatened to be brought, for the recovery of duties paid under protest. It is matter of history, that the alleged right to retain on these *two* accounts had led to great abuses and to much loss to the public; and it is to these *two* subjects, therefore, that the act of Congress particularly addresses itself." Again: "Besides the litigation spoken of, and which is said to lead to this result, is a litigation for duties paid under protest, and not for over-payment of unascertained duties." (3 How. R., 243.) Again: "Independently of this statute, the collector might have been sued for over-payments on unascertained duties, as well as for duties paid under protest. And it can hardly be reconciled with reason or consistency that Congress designed to preserve the right of suit in the one case, and to deny it in the other. Yet, if these words have the force contended for by the defendant in error, they give the right of action against the collector for duties paid under protest only, leaving the party who has overpaid unascertained and estimated duties no remedy but that of resorting to the Secretary of the Treasury." (*Ibid.*, 244.)

The effect of the act of March 3, A. D. 1839, was to take away the right of action against collectors in both these classes of cases. (*Cary vs. Curtis*, 3 How. R., 236.) But by way of compensation to the importer for the loss of his remedy by action, this act made it the duty of the Secretary of the Treasury, whenever it should be shown to his

satisfaction that in any case of unascertained duties, or duties paid under protest, more money had been paid to the collector, or the person acting as such, than the law required should have been paid, to take the prescribed measures to have it refunded to the person entitled to the over-payment. It may be proper to remark at this point (1) that this act did not in any way affect, or propose to affect, the *right* of the party making an over-payment in any case therein mentioned to repayment, and (2) that the power which it confers upon the Secretary of the Treasury is purely *administrative*, and in no sense *judicial*. If, therefore, under this act, an importer, in a case either of unascertained duties or of duties paid under protest, paid to a collector more money than he was by law required to pay, but could not show to the satisfaction of the Secretary of the Treasury that he had done so, he was without any enforceable remedy; but nevertheless, the action of the Secretary of the Treasury not being *judicial*, but merely *administrative*, the implied contract of the United States to refund to the importer what had been taken or detained from him without authority of law, still remained unsatisfied and undischarged.

Soon after the decision in the case of *Cary vs. Curtis* was made, the act of February 26, A. D. 1845, was passed. What changes in the law were effected by it? First, it restored *sub modo* the right of action against a collector in cases of duties paid under protest; and, second, it required the protest to be made in writing, and signed by the claimant at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof. It is as follows: "That nothing contained in the second section of the act entitled 'An act making appropriations for the civil and diplomatic expenses of government for the year one thousand eight hundred and thirty-nine,' approved on the third day of March, one thousand eight hundred and thirty-nine, shall take away, or be construed to take away or impair, the right of any person or persons who have paid, or shall hereafter pay money as and for duties, under protest, to any collector of the customs or other person acting as such, in order to obtain goods, wares, or merchandise, imported by him or them, or on his or their account, which duties are not authorized or payable, in part or in whole, by law; to maintain any action at law against such collector or other person acting as such; to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury touching the same, according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."—(5 Stat. at Large, p. 727.)

But that act is silent upon the subject of unascertained duties. It mentions only duties paid under protest. It is wholly inapplicable, therefore, to unascertained duties; and the rights of an importer, in

reference to the latter, remained the same *after* as they were *before* the passage of that act.

The only remaining act of Congress at all connected with this subject is the act of August 8, A. D. 1846. The second section of that act is as follows: "That the Secretary of the Treasury be, and he is hereby, authorized, out of any money in the treasury not otherwise appropriated, to refund to the several persons entitled thereto such sums of money as have been illegally exacted by collectors of the customs, under the sanction of the Treasury Department, for duties on imported merchandise, since the third of March, eighteen hundred and thirty-three: *Provided*, That, before any such refunding, the Secretary shall be satisfied, by decisions of the courts of the United States upon the principles involved, that such duties were illegally exacted: *And provided, also*, That such decisions of the courts shall have been adopted or acquiesced in by the Treasury Department as its rule of construction." (9 Stat. at Large, p. 84.)

That statute has no application to unascertained duties. It, in terms, applies only to duties *illegally exacted*. Now, unascertained duties, in the strictest sense of those terms, certainly as applicable to a case like the one now under consideration, are not illegally exacted. There can be no illegality as respects them, except in the detention of the over-payment after the true amount of duties has been legally ascertained.

When an entry is made, the collector, jointly with the naval officer, or alone where there is none, is required by law to make a gross estimate of the amount of duties on the goods entered; and if the goods be entered for home consumption, and not warehoused, no permit will be granted for landing them until such estimated duties are paid. (1 Stat. at Large, p. 664, § 49; 1 Ibid., p. 673, § 62; 9 Ibid., p. 53, § 1.) And, if it be necessary, in order to ascertain the duties thereon, to weigh, gauge, or measure the goods, they cannot, without the consent of the proper officer, be removed from the place where they are landed before they have been weighed, gauged, or measured; and if spirits, before the proof, or quality and quantity thereof are ascertained and marked thereon, by or under the direction of the proper officer for that purpose. (1 Stat. at Large, p. 665, § 51.) So far, therefore, from unascertained duties being duties illegally exacted, they are always demanded and paid in strict conformity to law. The very terms imply that duties are to some extent imposed and payable in the particular case, but that the true amount is unknown and undetermined at the time of payment. The law, in its requirements upon this subject, looks both to the security of the United States and to the interests of the importer. The just demands of the United States are secured by the payment of the estimated duties, and the goods are liberated without any unnecessary delay, so that they may at once go into the possession of the importer and enter into his business. But the object, as regards the United States, is to secure their just demands, and nothing more; and the payment is made under an implied contract on the part of the United States that the excess, if any, beyond the amount of duties actually imposed by law shall be refunded to the importer. There can be no doubt, then, that, in the

legal sense, unascertained duties are never illegally exacted, and, consequently, that the second section of the act of August 8, A. D. 1846, does not apply to them.

According to these principles, the case under consideration is in its nature a case of unascertained duties ; but it is insisted, on the part of the United States, that at the time when the importations which it embraces were made, the duties thereon, under a regulation of the Treasury Department, were required to be computed on the invoice quantity, and that the duties in question were, therefore, ascertained at the time of their payment. Without pausing to inquire whether the consequence deduced from this regulation would necessarily have followed, it is sufficient to remark that the regulation itself was in conflict with law, and invalid. *Marriott vs. Brune*; *The United States vs. Southmayd*; *Lawrence vs. Caswell*. "The Secretary of the Treasury is bound by the law ; and although in the exercise of his discretion he may adopt necessary forms and modes of giving effect to the law ; yet neither he, nor those who act under him, can dispense with or alter any of its provisions. It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress." *Per Mr. Justice McLean, in Tracy vs. Swartwout, 10 Peters' R., 95* : "Any instructions from the Treasury Department could not change the law." *Per Mr. Justice Thompson, in Elliott vs. Swartwout, 10 Peters' R., 153* : "The various circulars from the Treasury Department which have been referred to, and which have been construed in some cases to permit the deduction of the quantity not really arriving in this country, and in others to forbid it, are entitled to much respect in deciding on the true meaning of the revenue laws. But when contradictory or obscure, they furnish less aid, and are *never* decisive or uncontrollable." *Per Mr. Justice Woodbury, in Marriott vs. Brune, 9 How. R., 634, 635* : "The orders as well as the opinions of the head of the Treasury Department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court ; but it is the laws which are to govern, rather than their opinions of them, and importers, in cases of doubt, are entitled to have their right settled by the judicial exposition of those laws, rather than by the views of the department." And though, as between the custom-house officers and the department, the latter must by law control the course of proceeding, (5 Stat. at Large, 566,) yet, as between them and the importer, it is well settled that the legality of all their doings may be revised in the judicial tribunals. (*Tracy et al. vs. Swartwout, 10 Peters, 95* ; *United States vs. Lyman, 1 Mason, C. C., 504* ; *Opinions of Attorneys General, 1015.*)" *Per Mr. Justice Woodbury, in Greely vs. Thompson, 10 How. R., 234*. The regulation of the Treasury Department referred to by the solicitor cannot, therefore, have the influence or effect claimed for it in his argument. The duties in question here were in their nature, under the acts of Congress, unascertained at the time of their payment, and no regulation of the Treasury Department could deprive the petitioners of the right vested in them by law so to consider and treat them. The ob-

vious reason is, that no such regulation can change the supreme law of the land.

This, then, being a case of unascertained duties, it was competent for the Secretary of the Treasury, under the act of March 3, A. D. 1839, which for this purpose is still in force, if it had been shown to his satisfaction that more money had been paid to the collector than the law required should have been paid, to have taken the measures prescribed by that act, to have it refunded to the petitioners. But this, the petitioners allege, he has refused to do, upon the grounds that no protest was made, and that a portion of the claim was barred by the statute of limitations. The petitioners, therefore, are entitled to relief, unless the action of the Secretary of the Treasury is conclusive against them. We have already stated that the power of the Secretary of the Treasury under that act is purely administrative, and in no sense judicial. This is sufficiently obvious from the very terms of the act. It did not vest the Secretary of the Treasury with the power of deciding upon the rights of the claimant, except to the extent that he might be required to act upon them. It made it a condition precedent to the party's right to the Secretary's warrant upon the Treasurer for the over-payment, that he should satisfy the former that his claim belongs to one of the classes mentioned in the act, and was well founded. This mode of redress was thus conditioned and restrained, and for wise and good reasons. It would not have been either proper or politic to have authorized a payment out of the public treasury to a party whose rights had not been regularly adjudicated and legally ascertained, except upon the very condition imposed by the statute, that he should show to the satisfaction of the head of the Treasury Department that his case was one for which the statute meant to provide. It was not designed that he should obtain relief from a mere ministerial officer, unless his case was shown to be one on which such officer could act with entire safety to the public interests. If he failed to show such a case, then he failed to obtain the benefits of the statutory remedy; but it was not designed that his rights should be otherwise affected. The implied contract of the United States, in a case of unascertained duties, to refund the over-payment, would still continue in full vigor, the decision of the Secretary of the Treasury affecting merely his own official action, and nothing more. And it is no answer to this view, that in such a case the party was without remedy, except by an appeal to the legislative department of the government; for if that were sufficient, then there would be but few cases of contract of which this court could take cognizance.

Let an order be made authorizing the taking of testimony in this case.

STURGES, BENNET & CO. vs. THE UNITED STATES.

The dissenting opinion was delivered by Judge Blackford.
I am obliged to dissent from the judgment of the court in this case:
The petition attached to this opinion shows the grounds of the

claim. The duties sued for were collected during the years 1847, 1848, 1849, 1850, and 1851.

The petition, in my opinion, is defective, because it does not allege that any of the duties were paid *under protest*. The act of Congress of 1845, chapter 22, prohibits any suit against a collector for over-paid duties, if the payment was made without protest. That point is expressly decided by the circuit court of the United States for the Maryland district, at the April term, 1849, in *Brune vs. Marriott*. In that case the protest was not made until *after* some of the duties were paid, and the decision was that for such of the duties there could be no recovery. The language of the court is as follows: "The remaining question is, what duties were paid under protest within the meaning of the act of 1845? That act requires that the protest shall be made in writing, signed by the claimant, at or before the payment of the duties, and set forth distinctly and specifically the grounds of objection. The protest of April 9, 1847, cannot apply to the payments previously made, and the plaintiff is not entitled to recover them. But it is sufficient to cover all subsequent payments," &c.

If there has been a protest, the suit is allowed, as the statute expressly says, in order "to ascertain and try the legality and validity of such demand and payment of duties." I consider that statute to be as applicable to a suit in this court, against the government for over-paid duties, as it is to a suit for that cause in any other court, against the collector. The object of both suits is the same, namely: to ascertain and try the legality and validity of the demand and payment of duties alleged to have been over-paid. If such demand and payment of duties were legal and valid, the importer cannot, in a court professing to be governed by legal principles, recover those duties either from the collector or from the government. That appears to me to be a clear proposition. Congress has thought proper, by the law of 1845, to prescribe a certain rule for the collector and importer relative to the collection of duties; and whilst the law is in force that rule must be complied with. The rule is, that if the importer wishes to object to the amount of duty charged, the objection must be made at or before the payment of the duty. If no objection be made within the time limited by law, the demand and payment of the duty must be considered legal and valid.

It will be observed that the statute of 1845, which prohibits any suit for over-paid duties, unless there has been a sufficient protest, applies to duties of every description, without exception. 5 Stat. at Large, 727. The effect of this statute relative to the protest is clearly stated in an opinion delivered by Chief Justice Taney in 1849. His language is as follows: "The protest is not required to be made on or before the payment of what are called the estimated duties; for this payment is necessarily regulated by the invoice quantity, as well as the invoice price. The importer cannot at that time know whether there has been any loss by leakage; nor can he know, after it has been ascertained by the weigher and gauger, whether the collector will exact duties upon the amount stated in the invoice.

"The payment is legally made when the duties are finally determined, and the amount assessed by the collector; and a protest be-

fore or at that time is sufficient notice, as it warns the collector, before he renders his account to the Treasury Department, that he will be held personally responsible if the portion disputed is not legally due, and that the claimant means to assert his right in a court of justice.

“The payment of the money upon the estimated duties is rather in the nature of a pledge or deposit than a payment; for it remains in the hands of the proper officer, subject to the final assessment of the duties; and if more has been paid than is due, (which is most commonly the case,) the overplus belongs to the importer, and is returned to him.” *Brune vs. Marriott*, before cited. The Supreme Court affirmed that judgment, using, as to the protest, the following language: “But where the duties had not been closed up in any cases, when the written protest, in April, was filed—though the preliminary payment of the estimated duties had taken place—the court justly considered the protest valid. Because, till the final adjustment, the money remains in the hands of the collector, and is not accounted for with the government, and more may be necessary to be paid by the importer.” *Marriott vs. Brune*, 9 How., 619, 636.

The law is therefore settled, that under the aforesaid statute of 1845, the importer is not required to make his protest until after the weigher or gauger has made his return, and the importer has had a full opportunity to know what that return is, and for what sum he is legally chargeable. That being the law, it is clear that there can be no hardship or injustice in requiring the protest. But, on the other hand, if at any distance of time after duties have been paid without objection, and with a full opportunity of knowing the facts, the United States are to be subject to be called upon for alleged over-paid duties, there will be no end to the evils that will ensue.

The language of the Supreme Court of the United States in 1851, with respect to the question now under consideration, is as follows: “But it is proper to say, in order that the opinion of the court may not be misunderstood, that when we speak of duties illegally exacted, the court mean to confine the opinion to cases like the present, in which the duty demanded was paid under protest, stating specially the ground of objection. Where no such protest is made, the duties are not illegally exacted, in the legal sense of the term; for the law has confided to the Secretary of the Treasury the power of deciding, in the first instance, upon the amount of duties due on the importation. And if the party acquiesces, and does not, by his protest, appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal to which the law has confided the power of deciding the question.

“Money is often paid under the decision of an inferior court, without appeal, upon the construction of a law which is afterwards, in some other case, in a higher and superior court determined to have been an erroneous construction. But money thus paid is not illegally exacted. Nor are duties illegally exacted where they are paid under the decision of the collector, sanctioned by the Secretary of the Treasury, and without appealing from that decision to the judicial tribunals by a proper and legal protest. Nor are they within the principle decided in the case before us.” *Lawrence vs. Caswell*, 13

Howard, 488, 496. That is the unanimous opinion of the highest judicial tribunal in the United States, on the precise question now before us. It is the opinion of that court on the meaning of the act of Congress of 1845, before referred to. That opinion is, that duties paid *without protest*, as the duties in the case before us were paid, are not illegally exacted. And, surely, if the duties now sued for were not illegally exacted—that is, if the collection of those duties was lawful—the claimants can have no right, in a court of justice, to recover them back, either from the collector or from the government.

My opinion is, therefore, that the petition shows no ground for relief.

Statement of excess of duties exacted at the port of New York on liquors—allowances for actual deficiencies not having been made in the assessment of duties—imported by Messrs. Sturges, Bennet, & Co., "as owners." [Issued under instructions of November 9, 1854.]

Date of entry.	Vessel.	Where from.	Description of goods.	Invoice quantity.	Invoice value.	Actual gauge.	Loss or deficiency.	Value of deficiency.	Rate p. ct.	Duty on deficiency to be refunded.
1847.				<i>Gallons.</i>		<i>Gallons.</i>	<i>Gallons.</i>	<i>\$</i>		<i>Amount.</i>
April 22	Georges	Rochelle	30 casks brandy	2,346	\$1,866	2,281	65	\$225		
		Less previous	allowance for damage							\$27
May 4	Hope	Bordeaux	35 casks brandy	2,521	2,400	2,406	115	110	100	
			Less allowance as above.					22		
Aug. 11	Arethus	do	20 casks brandy	1,171	1,246	1,138	32		100	88
Nov. 13	Aglae	do	15 casks brandy	1,081	1,025	1,064	17	34	100	34
1848.								16	100	16
March 11	Lubec	do	20 casks brandy	1,136	1,625	1,100	36		100	52
May 28	C. Perkins	do	20 casks brandy	1,438	1,070	1,421	17		100	13
Aug. 28	Perseverance	Rochelle	73 casks brandy	4,054	2,164	3,886	168	90	100	
			Less allowance as above.					40		
Aug. 28	Perseverance	do	25 casks brandy	1,016	547	983	32		100	50
Dec. 21	Arrede	do	178 casks brandy	5,740	2,782	5,548	191		100	17
1849.								93	100	93
June 16	Carl Otto	Bordeaux	60 casks brandy	3,930	1,842	3,694	236	111		
			Less allowance as above.					85		
June 21	Norman	Rochelle	160 casks brandy	6,847	3,488	6,745	102		100	26
July 6	Courier	do	85 casks brandy	3,626	1,764	3,572	54		100	52
Aug. 14	Brooksbey	Glasgow	10 casks whiskey	1,459	783	1,441	18	26	100	26
Sept. 20	Sunny Eye	Bordeaux	45 casks brandy	2,863	1,083	2,859	4	10	100	10
Sept. 29	E. Meaus	do	40 casks brandy	2,572	2,327	2,482	90		2	2
Nov. 17	Harriet	Charante	15 casks brandy	1,072	1,020	1,048	24	81	100	81
Dec. 7	Prescott	Bordeaux	55 casks brandy	2,646	1,167	2,621	25	22	100	22
								11	100	11

CUSTOM-HOUSE, NEW YORK,
November 16, 1854.

I certify that the excess of duties paid by Messrs. Sturges, Bennet & Co., agreeably to the foregoing statement, amounts to \$2,068; that said duties have been accounted for to the treasury, and no part thereof heretofore paid back, and that neither of the parties claiming appear on the records of the custom-house as indebted to the United States.

HEMAN J. REDFIELD,
Collector.

Countersigned: J. A. R., C. S. T.
JOHN ROMY BROADHEAD,
Naval Officer.

I, Benjamin G. Arnold, a member of the firm of Sturges, Bennet & Co., do hereby certify on oath, that the claim above referred to has not been assigned, or alienated by operation of law or otherwise, that no portion thereof has been heretofore refunded, and that I am not, nor is either member of our firm, indebted to the United States, and that we were the owners of the merchandise within mentioned.

BENJAMIN G. ARNOLD.

To the Hon. ———,
Secretary of the Treasury.

Sworn before me, this 17th day of November, 1854.

JAS. HILLYER,
Commissioner of Deeds.

TREASURY DEPARTMENT,
November 30, 1855.

To the Court of Claims:

Pursuant to your order of the 26th instant, received here yesterday, with the letter of your chief clerk, dated the 28th instant, I herewith transmit a copy of the letter of this department to the collector of New York, dated November 9th, 1854, (marked No. 1,) and a copy of his report thereon, dated 16th November, 1854, (marked No. 2,) together with the original certified statement of the claim of Sturges, Bennet & Co., therein mentioned, (marked No. 3,) and a copy of my letter to the collector of New York, containing my decision on this claim, dated 2d January, 1855, (marked No. 4.)

The argument sanctioned by the collector, in his report in favor of this claim, and many others of the same class—that they are entitled, *in equity*, to similar repayment with those who had protested at the time of the assessment of the duties and appealed to the judicial tribunals—as well as the form upon which the certified statement is made, being that adopted in cases where repayment is required by the decisions of the courts of the United States, with the sanction of this department, seem to call for a brief explanation of the action of the department on this class of claims.

This department cannot perceive any force whatever in the argument, that these claimants are *equitably* entitled to the same repayment as those parties who had protested and appealed to the courts, for the plain and simple reason, that the exaction of all duties and taxes rests alone on positive law. Equitable considerations cannot, therefore, rightfully be applied to any question arising out of the assessment of taxes or duties.

When custom duties are imposed by law, it is the official duty of the Secretary of the Treasury to give a practical construction to the law, in order to carry it into effect. This has usually been done by circular orders addressed to the proper officers. Should any party charged with the payment of duties, under these instructions, claim that they are not warranted by the provisions of the law, he may pay the duties under protest, made at the time of payment, and appeal to the proper legal tribunal for its decision upon his rights. But if he acquiesces in the correctness of the assessment, and pays the duties without any objection, he should be forever concluded. If any party shall be allowed at any subsequent period, at his pleasure, to raise before this department, or any legal tribunal, any question involving the accuracy of the assessment of duties which he had previously paid without objection, there can be no final settlement of duties in any case whatever. The whole customs revenue of the United States would be subjected to vexatious and interminable reclamations.

This department cannot assent to the statement that any excess of duties has been paid in this class of cases. The duties were assessed pursuant to the instructions given by the Secretary of the Treasury in office at the time, upon the quantity of liquors claimed to have been contained in the casks at the time of their shipment abroad, according to the invoices duly authenticated, with the deduction of two per cent. for leakage, as provided by the act of 2d March, 1799. And this department has no sufficient ground for admitting, upon any facts which have come to its knowledge, that in these cases duties were paid upon any greater quantities of liquor than were actually imported.

All experience on this subject, in this as well as other countries, has demonstrated that absolute certainty as to the quantity of spirituous liquors in casks cannot be practically ascertained by any known methods. Arbitrary regulations of some description must be adopted from necessity in order to assess the customs duties imposed on such liquors by law. Whether the mode prescribed by the instructions of this department in force previous to the 14th July, 1851, was more or less correct than the gauger's return of the quantity contained in the casks when landed at the port of importation, as prescribed by the circular order of that date, cannot be regarded as absolutely certain. But as soon as it had been decided by the courts of the United States that the gauger's return was the legal method of ascertaining the quantity of spirituous liquor subject to duty, this department appears to have acquiesced, modified its instructions accordingly, and refunded the difference where any existed, in cases where protests had been duly made. It nowhere appears that this change was made in the instructions in consequence of any belief or opinion that the mode

of ascertaining the quantity of liquor imported subject to duty was more accurate than had been previously directed, but it was adopted merely because the courts of the United States had decided that the gauger's return was the legal criterion. Whether, in fact, the return of the gauger more nearly approximates to the actual contents of the casks than the invoice quantity, with the legal allowance of leakage, has not been determined by the substitution of one arbitrary rule for another in the ascertainment of duties.

This substitution of a new rule by the instructions of 14th July, 1851, cannot be regarded, in the view of this department, as having conferred new rights upon parties who had voluntarily, and without objection or protest, paid duties upon assessment made under the previous rule. So far from being placed, on the ground of equity, on the same footing as the parties who paid under protest and immediately appealed to the courts, these parties who made no objection to the mode of assessment must be presumed, after this lapse of time, to have had the duties refunded to them by the consumers.

JAMES GUTHRIE,
Secretary of the Treasury.

No. 1.

TREASURY DEPARTMENT,
November 9, 1854.

SIR: The enclosed statement of a claim of Messrs. Sturges, Bennet & Co., for allowances for deficiencies in importations of brandies and whiskey into the port of New York, is referred to your office for examination.

You will be pleased to prepare and forward to this department for its consideration a certified statement of the claim, accompanied by any information in your possession in regard to the class of claims to which it belongs that may be deemed useful to the department in its action in cases of this description.

Very respectfully, your obedient servant,

JAMES GUTHRIE,
Secretary of the Treasury.

H. J. REDFIELD, Esq.,
Collector of the Customs, New York.

No. 2.

CUSTOM HOUSE, NEW YORK,
November 16, 1854.

SIR: In pursuance of the instructions in your letter of the 9th inst., referring to this office for examination a claim of Messrs. Sturges, Bennet & Co., for allowance for deficiencies in importations of brandy and whiskey into this port, a certified statement of the same has been prepared and is transmitted herewith.

In compliance with your request for any information in regard to this class of claims that may be deemed useful to the department in its action thereon, I will briefly recapitulate the main parts (most of which are already in the possession of the department) having a bearing on this and similar cases.

Soon after December 1, 1846, when the existing tariff, substituting *ad valorem* for specific duties, went into operation, collectors were instructed to assess duty on the actual quantity of liquors imported, making allowance for leakage or deficiency, as had been the practice when the rates were specific; and in the cases where the allowance for deficiency had been omitted, the excessive duties were refunded as "erroneous estimates of duty." That regulation was rescinded on the 24th of March, 1847, when instructions were issued to levy duty on the invoice value without reference to deficiencies, unless arising from accident at sea. Such remained the rule of practice until the 14th of June, 1851, when it was revoked by a general circular directing that duties should be assessed only on the actual quantities imported. Meanwhile the Supreme Court of the United States had settled the principle in the cases of *Brune vs. Marriott*, and the *United States vs. Southmayd*. Under these decisions the refunding of duties was ordered on importations of sugar and molasses, without distinction as to whether the said duties had been paid under protest or not, by authority of the acts of Congress of October 16, 1837, March 3, 1839, August 8, 1846, and March 3, 1849.

The case of *Caswell vs. Lawrence* was afterwards decided by the Supreme Court, and instructions were issued in pursuance of that decision, on the 5th of November, 1852, to refund the duties charged on deficiencies in the importations of liquors, but restricting such refunding to cases where the duties had been paid under protest. In obedience to those instructions, on certifying statements of claim, all cases where the entries were not accompanied by protest were omitted, although included in the applications of the importers. In some of those one-half of the entries only were found to have been paid under protest; in others, a still smaller proportion; in some not a single entry contained a protest, and in very few was a regular protest entered against each amount of duty paid.

The claims now under consideration consist of such non-protested cases. From what precedes, it will be perceived that they are confined to importations during the period from March 24, 1847, to June 14, 1851. Subsequently to the latter date, the allowances for deficiency have always been made. Under the present practice, the importer in the first instance pays duty on the invoice value; and on liquidation of the entry, after the gauger's return is received, the duty on the deficiency is returned as "excess of unascertained duty."

In reference to the probable amount of the claims, the following estimate is submitted:

The imports of brandy and other spirits at this port	
from March 24, 1847, to June 14, 1851, amount to.	\$5,808,133 00
Deduct value re-exported.....	210,635 00
	5,595,498 00

The average deficiencies is found to be about 2 per cent., or.....	\$111,949 96
Deduct from this sum the duties paid under protest, which have been refunded.....	51,615 97
Leaving to be refunded on non-protested cases the sum of.....	60,333 99

To resume, the principle on which the cases depend has been settled by the Supreme Court and acquiesced in by the department. The equity of the claims is, therefore, established, and the only question remaining is a technical one in regard to protest.

Without entering into an examination of this question as applicable to those cases, it is proper to state, that the merchants have frequently and loudly complained of the hardships and inequality of the rule that refunds to the importer who paid under protest, and refuses restitution to him who submitted to an erroneous exaction without a written remonstrance. They contend that the only privilege acquired by protest is the right to sue; that the Secretary of the Treasury has the power, and has frequently exercised it, to refund duties not paid under protest, (referring especially to the parallel case of sugar and molasses,) and in support of this view has been cited the opinion of Chief Justice Taney, in the case of *Mason & Tullis vs. Kane*, (circuit court of Maryland, April term, 1851,) in which the learned judge, after deciding that the action cannot be maintained, because of the insufficiency of the protest, adds: "If improperly charged, it is no doubt yet in the power of the administrative department to do justice to the claimant."

I am, very respectfully, your obedient servant,

HEMAN J. REDFIELD, *Collector.*

Hon. JAMES GUTHRIE,
Secretary of the Treasury.

No. 4.

TREASURY DEPARTMENT,
January 2, 1855.

SIR: The claim of Messrs. Sturges & Bennet, of New York, as presented with your report, dated the 16th November last, being for the return of an excess of duties paid in the port of New York on certain importations of liquors in the years 1847, 1848, 1849, 1850, and on the 8th April, 1851, no allowance for deficiencies in quantity having been made in the estimate of duties on the same, has been carefully examined and considered, and the department perceives no reason to recede in this case from its decision heretofore made on similar claims, disallowing all such claims for allowance or return of

duties on importations prior to its circular instructions, dated the 14th June, 1851.

Very respectfully, your obedient servant,

JAMES GUTHRIE,

Secretary of the Treasury.

HEMAN J. REDFIELD, Esq.,

Collector of the Customs, New York.

UNITED STATES COURT OF CLAIMS.

STURGES, BENNET & Co. }

vs.

THE UNITED STATES. }

STATE OF NEW YORK, *City and County of New York, ss.*

On the 20th, 21st, and 22d days of March, A. D. 1856, personally came Edmund M. Evans and Junius R. Van Vechten, the witnesses within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within depositions were written down by me, the commissioner, and then proposed by me to the witnesses; and the answers thereto were written down by me in the presence of the witnesses, who then subscribed the depositions respectively in my presence.

The depositions of Edmund M. Evans and Junius R. Van Vechten, taken at the request of M. Blair, esq., solicitor for the United States, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Sturges, Bennet & Co. The adverse parties were notified, did attend, and did not object.

JNO. J. LATTING,
Commissioner.

Commissioner's fees..... \$19 00

Fees of witnesses..... 7 50

UNITED STATES COURT OF CLAIMS.

FREDERICK STURGES and others,
composing the firm of STURGES,
BENNET & Co., claimants,

vs.

THE UNITED STATES. }

MARCH 20, 1856.

Depositions of witnesses, taken on the part and at the instance of the United States, before John J. Latting, commissioner, at the city of New York, to be used in the investigation of the claim in the above entitled case.

City and County of New York.—Edmund M. Evans, a witness produced, sworn and examined, says: My name is Edmund M. Evans.

I am chief clerk of the liquidating department of the New York custom-house. I first went into the custom-house as a clerk, in October, 1850, as near as I can now state; I have been in the liquidating department since January, 1851; I am in the thirty-fourth year of my age; I reside at No. 82 West 11th street, in the city of New York, and have resided within the city of New York for the past year; I have no interest, direct or indirect, in the claim which is the subject of inquiry in this case; I am not related in any degree to the above named claimants, or to either of them.

Question by Michael Hoffman on behalf of the United States: What is this paper marked "A?"

Answer. This paper is a memorandum made from the entries, so far as furnished me, of Sturges, Bennet & Co., in the present case, showing the names of vessels, ports from whence they came, dates of arrival at New York; whether entered for warehouse or consumption, as to there being or not being any protest; whether there was or was not any deposit; also, as to whether there was or was not any claim made for damage; also, that the full duty on the amount of invoice was paid.

Question. What is meant by the letters N. P. on this paper?

Answer. No protest on the entry.

Question. What do the letters W. H. mean?

Answer. Warehouse entries.

Question. And also, what do the letters C. E. mean?

Answer. Consumption entry.

Question. Are the several entries mentioned in this paper according to the designation of these letters on file in the custom-house?

Answer. Yes, sir.

Question. In the custom-house at New York, on the entry of goods and making a deposit on estimate to await ascertainment of quantity and appraisement of value, when quantity is ascertained and appraisement is made, is or is not the duty liquidated?

Answer. It is liquidated.

Question. Was that the practice from 1847 to 1851 during the period of the making of these various entries by the claimants?

Answer. The only reply I can make to that is, that from the entries it appears that no deposits were taken within those dates, with a single exception, and that no allowance for deficiency was made. As a rule, none were taken.

Question. During the same period, was not the excess of duty paid at the time of entry over the liquidated duty refunded by the collector?

Answer. As I understand it, there was no excess of duty.

Question. On which of the entries of Sturges, Bennet & Co. was there an excess or deficit of deposit?

Answer. On none of them.

Question. Was there in any of these entries of Sturges, Bennet & Co. at the time of payment of duty, or at the time of the liquidation of the payment of duties, any protest made by said Sturges, Bennet & Co.?

Answer. None appears on the entries.

Question. In the liquidation of these duties on the entries of Sturges,

Bennet & Co., was not the duty assessed on the quantity stated in the invoice?

Answer. It was, with the exception of the allowance for damage stated in the paper marked "A."

Question. Was there any allowance for leakage of 2 per cent. on these entries?

Answer. None.

Question. In regard to merchandise entered for warehousing, are not the duties liquidated, according to the practice of the custom-house, before the same are allowed to be withdrawn by the importers, and was not this the practice in relation to the aforesaid entries made by Sturges, Bennet & Co.?

Answer. The duties are liquidated before all the goods expressed on the entry are withdrawn. As to the entries made by Sturges, Bennet & Co., I cannot speak definitely.

The witness being cross-examined by Morgan L. Ogden on behalf of the claimants, further deposes as follows:

Question. During the period extending from December 1, 1846, to June 14, 1851, when assessing duty on imported sugar, molasses or liquors, in case of the discovery of a clerical error in the invoice or in the calculation of the duty taken, was it or was it not the practice at the New York custom-house to correct the duty and refund something, or exact something more?

Answer. To the best of my knowledge and belief, clerical errors would have been corrected.

Question. During the same period, in cases where the appraisers raised the prices of the sugar, molasses or liquors, as given in the invoice, was it or was it not the practice to correct the duty taken, and exact something more?

Answer. So far as my knowledge extends, which is from the time I entered the liquidating department—say January, 1851—such was the practice.

Question. During the same period referred to in your last answer, when it was ascertained that the imported sugar, molasses or liquors had suffered damage by accident at sea, was it or was it not the practice to correct the duty taken and refund something?

Answer. To the best of my recollection it was.

Question. During the period last referred to, in cases when it was ascertained that the quantity of sugar, molasses or liquors actually imported exceeded the quantity named in the invoice, was it or was it not the practice to correct the duty taken, and exact something more?

Answer. I do not know.

Question. Do you know at what time the exaction of duties on the value of deficiencies in importations of sugar and molasses was discontinued?

Answer. I do not know of my own personal knowledge.

Question. At the present time, is it or is it not the practice at the New York custom-house, in assessing duty on sugar, molasses and liquors, to take, in the first instance, the exact duty chargeable on the invoice quantity, and afterwards refund the duty exacted on the deficiency in quantity, when any is ascertained?

Answer. It is.

Question. When, in your examination-in-chief, you speak of deposits, what do you mean by deposits?

Answer. I mean that at one period, an estimated amount was taken by the custom-house, which they termed a deposit, to secure the duties on certain entries.

Question. Do they take at the custom-house now what you term deposits?

Answer. No, sir.

The further examination of the witnesses is adjourned to March 21, 1856, at 12 m.

MARCH 21, 1856.—The parties appearing, by their counsel aforesaid, and the said witness, Edmund M. Evans, appearing, deposes as follows:

Question. Do you know of any other matter relative to the claim in question in this suit? and if you do, state it.

Answer. I am not aware of any.

EDMUND M. EVANS.

Taken, subscribed, and sworn to before and by me, and in my presence.

JNO. J. LATTING,
Commissioner.

A.

CUSTOM HOUSE, NEW YORK, *Collector's Office*, ———, 185 .

N. P. Ship Georges, from La Rochelle, April, 1847, (C. E.,)	full duty paid; no deposit.	
(allowance of 40 per cent. on one pipe, "damage.")		
N. P. Barque Hope, from Bordeaux, May, 1847, (C. E.,)	do	do.
(allowance of 32 per cent. on one-half pipe, "damage.")		
N. P. Barque Aglae, from Bordeaux, Nov., 1847, (C. E.,)	do	do.
N. P. Barque Lubec, from Bordeaux, March, 1848, (C. E.,)	do	do.
N. P. Barque C. Perkins, from Bordeaux, May, 1848, (C. E.,)	do	do.
N. P. Schr. Perseverance, from Rochelle, Aug., 1848, (W. H.,)	do	do.
(allowance of 95 per cent. on one-half pipe, "damage.")		
N. P. Schr. Perseverance, from Rochelle, Aug., 1841, (C. E.,)	do	do.
N. P. Brig Arvede, from Rochelle, Dec., 1848, (W. H.,)	do	do.
N. P. do do do (C. E.,)	do	do.
N. P. Brig Norman, from Rochelle, June, 1849, (W. E.,)	do	do.
N. P. do do do (C. E.,)	do	do.
N. P. Brig Carl Otto, from Bordeaux, June, 1849, (C. E.,)	do	do.
(four entries; allowance of 95 per cent. on 2½ pipes, "damage.")		
N. P. Brig Courier, from Rochelle, July, 1849, (W. H.,)	do	do.
N. P. do (2 entries) do do (C. E.,)	do	do.
N. P. Ship Brooksby, from Glasgow, Aug., 1849, (W. H.,)	do	do.
N. P. Barque Sunny Eye, from Bordeaux, Sept., 1849, (W. H.,)	do	do.
N. P. do do do (C. E.,)	do	do.
N. P. Brig Harriett, from Charente, Nov., 1849, (W. H.,)	do	do.
N. P. Brig Prescott, from Bordeaux, Dec., 1849, (W. H.,)	do	do.
N. P. Brig Vidar, (2 ent.,) from Rochelle, Dec., 1849, (W. H. & C. E.)	do	do.
N. P. Brig Neptunus, from Charente, February, 1850, (W. H.,)	do	do.
N. P. do do do (C. E.,)	do	do.
N. P. Brig Favoriten, from Rochelle, February, 1850, (W. H.,)	do	do.
(allowance of 95 per cent. on one-half pipe.)		
N. P. Barque Farewell, from Rochelle, March, 1850, (W. H.,)	do	do.
N. P. Brig Cognac, from Charente, March, 1850, (W. H.,)	do	do.
N. P. Brig Hertha, from Rochelle, May, 1850, (W. H.,)	do	do.
N. P. Brig Travail, from Charente, May, 1850, (W. H.,)	do	do.

N. P. Brig <i>La Manche</i> , from Bordeaux, May, 1850, (W. H.,)	full duty paid; no deposite.	
N. P. Brig <i>L. Alfred</i> , from Charente, July, 1850, (W. H.,)	do	do.
N. P. Barque <i>Alexander</i> , from Rochelle, Aug., 1850, (W. H.,)	do	do.
N. P. Ship <i>Brooksby</i> , from Glasgow, October, 1850, (W. H.,)	do	do.
N. P. do do do (C. E.,)	do	do.
N. P. Barque <i>Tally-ho</i> , from Rochelle, October, 1850, (W. H.,)	do	do.
N. P. Barque <i>Brilliant</i> , from Bordeaux, Nov., 1850, (W. H.,)	do	do.
N. P. Brig <i>Louise and Caroline</i> , from Bordeaux, Jan., 1851, (W. H.)	do	do.
N. P. Barque <i>Malina</i> , from Bordeaux, Jan., 1851, (W. H.,)	do	do.
N. P. Barque <i>Alexander</i> , from Rochelle, Feb., 1851, (C. E.,)	do	do.
N. P. Barque <i>Neptunus</i> , from Rochelle, Feb., 1851, (W. H.,)	do	do.
N. P. Barque <i>Scotland</i> , from Bordeaux, March, 1851, (W. H.,)	do	do.
N. P. Brig <i>Union</i> , from Rochelle, March, 1851, (W. H.,)	do	do.
N. P. Barque <i>N. Esperance</i> , from Charente, Apl., 1851, (W. H.,)	do	do.

No allowance for "leakage" was made on any of the foregoing. The only allowance made was for "damage," and this was on special application by the importer.

JOHN J. LATTING, *Commissioner*.

MARCH 21, 1856.—The parties appearing by their counsel aforesaid, and Junius R. Van Vechten, a witness, produced, sworn and examined on the part and behalf of the United States, deposes as follows :

Question. What is your name?

Answer. Junius R. Van Vechten.

Question. What is your occupation?

Answer. Entry clerk in the New York custom-house.

Question. What is your age?

Answer. Thirty-four years and upwards.

Question. What has been your place of residence for the past year?

Answer. Brooklyn, Kings county, Long Island, N. Y.

Question. Have you any interest, direct or indirect, in the claim which is the subject of inquiry in this suit?

Answer. I have not.

Question. Are you related in any degree, and if so, what, to the claimants, or either of them?

Answer. I am not, that I am aware of.

Question by James B. Craig, on part of defendants: How long have you been in the New York custom-house?

Answer. Since first of August, 1849.

Question. From your knowledge of the routine of official business at the custom-house, do you consider yourself competent to speak of the practice from 1847 to 1851?

Answer. I do.

Question. What was the practice during those years in assessing duty in regard to allowances for damage and deficiencies?

Answer. From about the first of February, 1847 to the 24th of March, 1847, the actual deficiency and two per cent. allowance was deducted. From the 24th of March, 1847, up to, I think, the first of June, 1847, no deficiency was allowed on liquors except when they were damaged by stress of weather, or accidents at sea on the voyage of importation, in which latter case an appraisement of actual damage was made by the appraisers. This practice continued on liquors to the first of June, or about the middle of June, 1851, when two

per cent. and actual deficiency was again allowed. From the last date until the 23d of June, 1852, this practice was continued, and since 23d June, 1852, actual deficiency without the two per cent. was allowed, and such is the practice at the present time.

Question. Under what instructions was this the practice?

Answer. Under instructions from the Secretary of the Treasury, about the dates mentioned above.

Question. Look at the original entries of the several importations in question as detailed in the exhibit marked A, and state whether any allowance was made for damage on the voyage of importation in pursuance of the instructions of the Secretary of 24th March, 1847?

Answer. The claim for damage was allowed on five of those entries, as stated in exhibit A.

Question. Do you know of any other change in the practice during the same period—that is, from 1847 to 1851—than those already referred to in the instructions of the Secretary of the Treasury?

Answer. I do.

Question. What were they?

Answer. Under instructions of May 27, 1847, the actual deficiency of outage was allowed upon molasses in casks. And in July, 1850, the actual deficiency was also allowed on sugar, under instructions of July 5, 1850. This practice has continued to the present time.

Question. What was the practice in regard to assessing duty on the invoice value of sugar, molasses and liquors?

Question waived.

Question. Under the practice at New York custom-house from 1847 to 1851, and to the present time, what is considered a liquidated or ascertained duty?

Answer. When the discharging officer, weigher, gauger, and measurer shall have made their official return of the discharge, weight, gauge, or measure of articles subject to be weighed, gauged or measured, and the appraisers shall have decided upon the value of all the merchandise and assess damage, if any, the entries are closed or liquidated in accordance with their reports; and when the amounts thus ascertained are examined and verified by the naval officer, the duties so ascertained become liquidated or ascertained duties.

Question. Were the duties assessed on the entries of Sturges, Bennet & Co., referred to in exhibit marked A, ascertained or liquidated duties at the times they were paid?

Answer. As to entries for consumption they were not liquidated duties at the time of payment. As to warehouse entries they were.

Question. Were or were not sugar and molasses subject to different regulations in regard to allowances for damage and deficiency from liquors, and for what cause, during the period from 1847 to 1851?

Answer. They were, under regulations or instructions from the Secretary of the Treasury, as before stated.

The latter part of this answer is stricken out at the request of the witness.

On cross-examination by Mr. Ogden, of counsel for the claimants, the witness says:

Question. On your direct examination you have said that when the

gauger has made his return, the duties are closed or liquidated in accordance with his report, and the amount thus ascertained becomes a liquidated or ascertained duty. Does it not appear that on all the importations in question there was a deficiency in quantity according to the returns of the gaugers, and was the duty closed or liquidated in accordance with those returns, allowing for that deficiency?

Answer. It does appear from the returns of the gaugers that on all the importations in question there was a deficiency in quantity, and the duty was not closed or liquidated in accordance with those returns, allowing for that deficiency. This allowance for deficiency was not made in pursuance of instructions, which declared that in no case was duty to be taken or assessed on less than invoice value and quantity; the object of referring to gauger's returns being to ascertain, before charging the collector with the duties, that no greater quantity or value was imported than that declared upon the invoice.

Question. Please look at this entry of Sturges, Bennet & Co., and state what it is?

Answer. It is one of the entries of the importations in question. An entry of one hundred and twenty-five (125) casks of brandy by the schooner Perseverance, arrived August 28, 1848, from Rochelle. The goods were entered for warehouse, and the liquidated duty amounts to three thousand one hundred and eighty-eight dollars.

Question. Please look at these entries and state what they are?

Answer. These entries are withdrawals for consumption of part of the above mentioned importation by the Perseverance. They bear date September 7, 1848, one of them; the other, September 8, 1848: the first for 20 casks, duty \$226, paid September 7, 1848; the second entry is for 15 casks, on which duty of \$434 was paid September 8, 1848.

Question. On the 7th and 8th of September, 1848, was the collector in possession of the returns of the discharging officer who attended to the discharging of the said schooner Perseverance, and of the gauger who gauged the brandies imported by that vessel?

Answer. It is not likely that he was in possession of those returns, as the usual time required for that purpose is about twenty days.

Question. Would it not be in accordance with the practice at the custom-house to take those duties paid on the 7th and 8th September, without any reference to the return of the gauger?

Answer. It would, undoubtedly.

The further direct examination of the witness is adjourned to the 22d day of March, 1856, at 11 a. m.

MARCH 22, 1856.—The parties appearing by their counsel aforesaid, and Junius R. Van Vechten, the witness above named, appearing, and being further examined by Mr. Craig on the part of the United States, deposes as follows:

Question. In your direct examination you say the duties on the warehouse entries of Sturges, Bennet & Co., described in the exhibit marked A, were at the time of payment liquidated or ascertained duties; and in answer to one of the cross-interrogatories, you say it is not likely the collector was in possession of the gauger's return of the

merchandise imported per the *Perseverance* at the time of the payment of the duty on the merchandise withdrawn from warehouse for consumption on the 7th and 8th of September, 1848, when the payments were made. Please explain.

Answer. The aggregate of importations entered for warehousing by any given vessel constitutes the warehouse entry; and although merchants are allowed the privilege of withdrawing for payment of duty certain portions of the importation before liquidation of quantity, it does not impair the warehouse bond, nor can this payment be considered as other than a deposit for account of the duty to be ascertained on final liquidation; and when the warehouse entry is liquidated, credit is given for the amounts so deposited, and they become a part payment on account of the liquidated amount of duty on the entry; but these withdrawals cannot be considered as other than fractional parts of the whole entry as closed or liquidated.

Question. Do you know of any other matter relative to the claim in question, in this suit? and if you do, state it.

Answer. I do not.

JUNIUS R. VAN VECHTEN.

Deposition taken by me, and subscribed to before me by the witness, in my presence.

JOHN J. LATTING,
Commissioner.

STURGES, BENNET & CO. *vs.* THE UNITED STATES.

Scarburgh, J., delivered the opinion of the court.

In the years 1847, 1848, 1849, 1850, and 1851, the petitioners imported large quantities of brandy and whiskey in casks. The quantity entered and appearing on the invoices largely exceeded the quantity ascertained by the return of the gaugers, and under a regulation of the Treasury Department, then existing, duties were levied on the whole invoice quantity, without making any deduction for deficiencies shown by the returns of the gaugers. The several sums of money paid by the petitioners on such deficiencies amounted to the sum of two thousand and sixty-eight dollars.

When this court considered the question, whether testimony should be ordered in this case, it was assumed that on the entries the duties were paid as estimated or unascertained duties. We then held, that the regulations of the Treasury Department, under which duties were levied on the deficiencies shown by the returns of the gaugers, was unlawful, and that the petitioners are entitled to relief against the United States for the amount so levied.

It now appears, from the evidence, that much the larger portion of the brandy and whiskey imported by the petitioners was warehoused, and that the duties on the deficiencies in such importations were paid on the redelivery of the liquors to them from the warehouses. The act of August 6, A. D. 1846, establishing the warehousing system, requires the goods warehoused "to be kept with due and reasonable

care, at the charge and risk of the owner, importer, consignee, or agent, and subject at all times to their order, *upon payment of the proper duties* and expenses, to be ascertained on due entry thereof; for warehousing, and to be secured by a bond of the owner, importer, or consignee, with surety or sureties to the satisfaction of the collector, in double the amount of the said duties, and in such form as the Secretary of the Treasury shall prescribe." (9 Stat. at L., p. 53.) The condition of the bond prescribed by the Secretary of the Treasury, under this act, is as follows: "The condition of this obligation is such, that if the above bounden, (here insert the names of the principal and sureties,) or either of them, or either of their heirs, executors, or administrators, shall, and do, at or before the end of one year, to be computed from the day on which the goods, wares, and merchandise, entered for warehousing by or for the above bounden, (insert the name of the principal,) as imported in the ———, ——— master, from ———, as per entry, made at the port of ———, (insert the first port of entry,) and dated the ——— day of ———, in the year aforesaid, shall have been deposited thereat in public store, well and truly pay, or cause to be paid, unto the collector of the customs for the port of ———, for the time being, the sum of ——— ^{Ten} dollars, or the amount of the duties to be ascertained as due and owing on the aforesaid goods, wares, and merchandise, or shall otherwise secure, or cause the amount of said duties to be secured, conformably to law, then this obligation to be void; else to remain in full force and virtue." (1 Mayo's Synopsis, p. 331.)

The regulation of the Treasury Department, which, during the whole period embraced by the importations made by the petitioners, required the collector to exact duties on the invoice quantity of liquors imported, without making any deduction for deficiencies which might appear by the returns of the gaugers, originated in a misconstruction of the tariff act of 1846, and was, therefore, invalid. (*Marriott vs. Brune*, 9 How. R., 619; *United States vs. Southmayd*, *ibid.*, 637; *Lawrence vs. Caswell*, 13 How. R., 488.)

We have heretofore held in this case, that the act of February 26, A. D. 1845, (5 Stat. at L., p. 727,) is not applicable to a case of unascertained duties; and in the case of *James Beatty's Executor vs. the United States*, we held, that the want of a protest does not bar a party's claim against the United States for overpaid duties. See, also, the opinion of this court in the cases of *William W. Spence and Andrew Reid vs. the United States*, and *David Wood vs. the United States*.

The question now presented is not precisely the same as that heretofore considered and decided in this case, or as the questions considered and decided in the cases of *Beatty vs. the United States*, *Spence and Reid vs. the United States*, and *Wood vs. the United States*. We are now for the first time called upon to consider whether a party who, on the redelivery to him of warehoused goods, pays without protest duties not imposed by law, but which are exacted by the collector, is entitled to relief against the United States.

Considering the question now presented under the aspect most unfavorable to the petitioners, it may be thus stated: Can money paid

for duties not imposed by law, with a knowledge of all the facts, but under a mutual mistake of the law—both parties having the law in contemplation and in good faith meaning to conform to it, but acting under a misconstruction, which was ascertained by subsequent decisions of the Supreme Court of the United States—be recovered back? That money, thus paid, cannot be conscientiously retained, is a proposition which no honest mind can resist. Its retention can be excused only on the ground of positive law. There is no room for the slightest doubt that in this instance the money was paid under the influence of the mistake just described, and, to our minds, it is obvious that if there be no right of repetition, the law sanctions the doctrine, that the property of one man can be acquired by another, without the consent or fault of the owner. This cannot be. "It is an universal principle, founded in reason, that no one is entitled to have or retain that which *ex æquo et bono* belongs to another: a principle found in every code, and circumscribed in its application only by positive rules, founded on the convenience and the necessities of mankind." (Per Johnson, J., in *Lawrence vs. Beaubien*, 2 Bailey R., 648.)

We do not mean to assert the broad proposition, that money paid under a mere mistake of the law can be recovered back. On the contrary, there can be no doubt that if it be paid in discharge of a debt contracted during infancy, or of a debt which would otherwise have been barred by the statute of limitations, or where any merely legal defence existed against a claim for the money and it may be honestly retained, no action will lie for its recovery. We entirely concur in the doctrine laid down by Lord Mansfield on this point, "that if a man has actually paid what the law would not have compelled him to pay, but what in equity and good conscience he ought, he cannot recover it back." *Bize vs. Dickason*, 1 T. R., 286. It is equally clear, too, that where money is paid on a fair and deliberate compromise of a doubted and doubtful right, both standing on equal terms and respectively taking their chances of the result, it cannot and ought not to be recovered back.

Nor do we mean to deny that where money is paid under a mere *ignorance* of the law, it cannot be recovered back. Whilst we do not very clearly perceive how the maxim *ignorantia juris non excusat* can have any just application to such a case, still we do not find it necessary at present to question its applicability under proper restrictions. There can be no doubt that this maxim "is an indispensable rule of legal and social policy; it is that without which crime could not be punished, right asserted, or wrong redressed," (*Culbreath vs. Culbreath*, 7 Georgia R., 70-1,) and we surely would not weaken its force in its just and proper sense. But the very idea of *excuse* implies that there is something to be excused—that there is delinquency of some kind; and hence the maxim may justly be invoked where crime has been committed, a wrong done, a right withheld, or a duty neglected. But to our minds it is a plain perversion of both the language and the spirit of the maxim, to apply it to one who has done no wrong, and withheld no right, and neglected no duty; but is himself the injured party, over whom an advantage in opposition to his legal rights and interest has been acquired. Such an application of it offends the

moral sense of every man, not only because it is a manifest perversion of language, but because it is palpably unjust. It does not seem to us that there is any motive of public policy which can justify it.

A distinction which, it is insisted, is both clear and practical, has been taken in some of the cases between *ignorance* and *mistake* of the law, and it has been suggested that much of the confusion in the books and in the minds of professional men upon this subject, is to be traced to the failure to recognise this distinction. "Ignorance," it is said, "implies passiveness; mistake implies action. *Ignorance* does not pretend to knowledge, but *mistake* assumes to know. *Ignorance* may be the result of laches, which is criminal; *mistake* argues diligence, which is commendable. Mere *ignorance* is no mistake; but a mistake always involves ignorance, but not that alone." And, moreover, "mere ignorance of law is not susceptible of proof. Proof cannot reach the convictions of the mind undeveloped in action; whereas a mistake of the law, developed in overt acts, is capable of proof like other facts." *Culbreath vs. Culbreath*, 7 Georgia R., 70; *Lowndes vs. Chisolm*, 2 McCord Ch. R., 455; *Lawrence vs. Beaubien*, 2 Bailey R., 623; *Hopkins vs. Mazyck*, 1 Hill Ch. R., (S. C.,) 242, 251; *Robinson vs. City Council*, 2 Richardson R., 317, 320.

In the case of *Hopkins vs. Mazyck*, 1 Hill Ch. R., (S. C.,) 250, the court, supposing that the observations of the chancellor were calculated to shake the rule in *Lowndes vs. Chisolm*, and *Lawrence vs. Beaubien*, thought it necessary to use the occasion to express their adherence to it. The learned judge who delivered the opinion of the court said: "*Lawrence vs. Beaubien* was decided upon much consideration, and the more I have reflected upon it since, the more I am confirmed in its correctness; and I feel persuaded that all doubts about it proceeded from misapprehension of the principle on which it is founded. There is, as I understand it, a very obvious distinction between ignorance and mistake of law. Ignorance cannot be proved, (who can enter into the heart of man and ascertain how much knowledge dwells there?) and for that reason the courts cannot relieve against it. But not so in regard to a mistake in law. That is sometimes susceptible of proof. In relation to the general rules of property and common honesty, which every one of common understanding must necessarily be taught by their intercourse with society—as, that we have no right to the property of another, and that when, as in this case, one has parted from his property, either voluntarily or for a good or valuable consideration, his dominion and power over it ceases—no one will obtain credit for the pretence of being mistaken. But who that has had any experience in the profession of the law, does not know that a whole life of intense application is insufficient to develop all its mysteries, and that the most untiring zeal and ardent pursuit must leave many of the secret recesses unexplored? And shall it be said that those whose pursuits in life are inconsistent with the study of the law shall understand its most subtle and intricate distinctions by intuition, and that at the price of their fortunes? I trust not. Mistakes as to matters of fact have always been regarded as relievable upon clear, full, and irrefragable proof; and mistakes in law ought to be upon the same footing, when the proof is equally cer-

tain. Suppose a party claiming the benefit of a contract founded upon a mistake of law, should, when put to answer it, admit the fact and be base enough to insist on it, where is the conscience so seared against the claims of justice and common honesty, as not to revolt at it? Is not a mistake of this sort as susceptible of proof as a mistake in a matter of fact? Lawyers are the professional advisers of the community; they are looked up to as oracles in this department; and when, as in *Lawrence vs. Beaubien*, their client is misled by them and makes a contract against his interest, what higher evidence can be wanted of the fact of mistake? Is it not as satisfactory as the admission of the party benefited by the contract? This is only one mode of proof, and I doubt not that there are others which would be satisfactory. But we regard the question as definitely settled, and have only thought it necessary to say this much to vindicate it from doubts in which the opinion of the chancellor was calculated to involve it." In the later case of *Robinson vs. City Council*, 2 Richardson R., 320, the learned judge who delivered the opinion of the court said: "An actual mistake of the law, made directly in reference to the law itself, is distinguishable from negative inattention. It is the difference between delusion and ignorance." The cases of *Lawrence vs. Beaubien* and *Robinson vs. City Council*, may be regarded as illustrations of the distinction between *mistake* and *ignorance* of law. The former was a case of *mistake* of law, and relief was granted; the latter was a case of *ignorance* of law, and relief was denied.

In the case of *Culbreath vs. Culbreath*, 7 Georgia R., 70, the plaintiff, an administrator, made distribution of his intestate's estate amongst the defendants, to the exclusion of other distributees, with a knowledge of all the facts, but in *mistake* of the law. The object of the suit was to recover the over-payment. The learned judge who delivered the opinion of the court said: "The difference [between *ignorance* and *mistake* of the law] may be well illustrated by the case made in this record. If the plaintiff (the administrator) had refused to pay the distributive share in the estate which he represented to the children of his intestate's deceased sister, upon the ground that they were not entitled in law, that would have been a case of ignorance, and he would not be heard for a moment upon a plea that, being ignorant of the law, he is not liable to pay interest upon their money in his hands. But the case is, that he was not only ignorant of their right in law, but believed that the defendants were entitled to their exclusion, and acted upon that belief by paying the money to them. The ignorance, in this case, of their right, and the belief in the right of the defendants, and action on that belief, constitute the mistake."

The doctrine, therefore, that there is a clear and practical distinction between *ignorance* and *mistake* of the law, not only seems to be founded in reason and justice, but is sustained by authority eminently entitled to respect. Assuming this distinction to be sound and correct, the declaration that where money is paid with a knowledge of the facts, but in *ignorance* of the law, it is a *gift* to the person who receives it, becomes not only intelligible, but consistent alike with truth and justice. The payment having been made, and no other assignable or provable motive for it existing, notwithstanding the

maxim nemo præsумitur donare, still the conclusion is inevitable that it was a gift. But where money is paid under "an actual mistake of the law, made directly in reference to the law itself," 2 Richardson R., 320, to say that the payment is *voluntary* and a *gift* to the party receiving it, is as untrue as it is unjust. To apply the maxim *volenti non fit injuria* to such a case, is, to our minds, plainly absurd. Such a mistake, as was forcibly said by Butler, J., in *Robinson vs. City Council*, "is distinguishable from negative inattention. It is the difference between delusion and ignorance." The idea that a gratuity was intended in such a case is preposterous. "The mind no more assents to the payment made under a mistake of the law, than if made under a mistake of the facts; the delusion is the same in both cases; in both alike the mind is influenced by false motives." *Northrop vs. Graves*, 19 Conn. R., 554.

The supreme court of errors of Connecticut have distinctly asserted, that when money is paid by one under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right, in good conscience, to retain, it may be recovered back, whether such mistake be one of fact or of law; and this, they insist, may be done, both upon *Christian* morals and the common law." *Northrop vs. Graves*, 19 Conn. R., 548. We concur in this doctrine. We believe that it is sustained by the principle of common law, and the adjudications most entitled to respect. We do not mean to say that all the cases can be reconciled with each other. It must be conceded that there is, to some extent, a conflict of authority on this subject. We think, however, that most, if not all, of the citations which can be made against granting relief in cases of mistakes of the law, consist either of mere *dicta*, or of language used in cases which did not call for it, but which might have been decided upon other grounds. The cases are few where the principle held in the case of *Northrop vs. Graves* was necessarily involved and rejected by a direct and positive adjudication.

The principle of the case of *Northrop vs. Graves* has been re-affirmed in the case of *Stedwell vs. Anderson*, 21 Conn. R., 139. In the latter case it was applied to the conveyance of property, and, in thus applying it, the court stated it in this manner: "When property has been conveyed through mistake, by deed, which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee, in good conscience, has no right to retain, a court of chancery will interfere and correct that mistake, whether it arose from a misapprehension of the facts, or of the legal operation of the deed."

The same principle was expressly held in the case of *Culbreath vs. Culbreath*, 7 Georgia R., 64. In that case the court say: "If there is justice in the plaintiff's demand, and injustice or unconscientiousness in the defendant's withholding it, the action lies; or, to use more appropriate language, the law will compel him to pay. Now, when money is paid to another, under a mistake as to the payer's legal obligation to pay, and the payee's legal right to receive it, and there is no consideration, moral, or honorary, or benevolent, between the parties by the ties of natural justice, the payer's right to recover it

back is perfect, and the payee's obligation to refund it is also perfect—it becomes a *debt*. It is a case fully within the *ex æquo et bono* rule." *Ibid.*, 68, 69.

In the case of *Lowndes vs. Chisolm*, 2 McCord Ch. R., 455, the question directly before the court, and the very point on which the case was decided, was, whether relief can be granted in cases of a mistake of the law. The doctrine was considered "well established that relief is given where the mistake has been clearly one of law;" and it was thought that "the authorities relied on put the matter beyond all doubt, if, indeed, it could be doubted at this day."

In the case of *Lawrence vs. Beaubien*, 2 Bailey R., 623, this doctrine was applied to the relief of a party from the obligations of a contract under seal. It was there held, that a mistake of law is a ground of relief from the obligations of such contract, where one party acquires nothing, and the other neither parts with any right nor suffers any loss, and *ex æquo et bono* ought not to be binding; and that it makes no difference that the parties were fully and correctly informed of the *facts*, and the mistake as to the *law* was reciprocal. The court considered that there is no difference in principle between an action to recover back money paid, and one to enforce a contract founded upon a mistake of law; for, in general, the same principle which furnishes a protection from loss supplies, also, the remedy for a wrong. *Ibid.*, 650. It will be recollected that in the case of *Hopkins vs. Mazyck*, 1 Hill Ch. R., 242, the court, supposing that the observations of the chancellor might shake the rule in the cases of *Lowndes vs. Chisolm*, and *Lawrence vs. Beaubien*, made use of the occasion to express their adherence to it.

The same doctrine seems to be well established in Kentucky. *Fitzgerald vs. Peck*, 4 Litt. R., 125; *Underwood vs. Brockman*, 4 Dana R., 309. In the latter case it was held, that if a man, without any other motive or consideration than an erroneous opinion respecting his legal rights and obligations, release a right, pay money, or undertake to do any act, he is entitled to relief equally as if he had acted under a mistake of fact, and for the same reason, namely, that the contract was not such as the parties, or one of them at least, really contemplated; "and such," the court say, "we understand to be the rational and consistent doctrine of the common law established in Kentucky."

In the case of *Moses vs. Macferlan*, 2 Burr R., 1002, Lord Mansfield states the general principles of the action of *indebitatus assumpsit* for money had and received. "This kind of equitable action," he said, "to recover back money which ought not in justice to be kept, is *very beneficial*, and therefore *much encouraged*. It lies *only* for money which, *ex æquo et bono*, the defendant *ought* to refund; it does *not lie* for money paid by the plaintiff, which is claimed of him as *payable in point of honor and honesty*, although it *could not have been recovered* from him by any course of *law*, as in payment of a *debt barred by the statute of limitations* or *contracted during his infancy*, or to the extent of principal and legal interest upon an *usurious contract*, or for money *fairly lost at play*, because, in all these cases, the defendant may retain it with a *safe conscience*, though by *positive law* he was

barred from recovering. But it *lies* for money paid by *mistake*, or upon a consideration which happens to *fail*, or for money got through *imposition*, (express or implied,) or *extortion*, or *oppression*, or an *undue advantage* taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund* the money." Here Lord Mansfield broadly lays down the doctrine that the action lies for money paid by *mistake*, without making any distinction between a mistake of *law* and a mistake of *fact*—"a suggestion," it has been said by a learned court, (*Northrop vs. Graves*, 19 Conn. R., 556,) "of a much more recent date."

Chief Justice De Grey recognized the same principle in the case of *Farmer vs. Arundel*, 2 Wm. Black. R., 825. He said: "When money is paid by one man to another on a mistake either of *fact* or of *law*, or by deceit, this action will certainly lie. But the proposition is not universal, that whenever a man pays money which he is not bound to pay, he may, by this action, recover it back. Money due in point of honor or conscience, though a man is not compellable to pay it, yet if paid, shall not be recovered back." Without deciding whether the money in that case could have been demanded by the defendant, the court considered it an honest debt, and relief was denied.

In the case of *Bize vs. Dickason*, 1 T. R., 287, Lord Mansfield lays down the same doctrine. "But where," he said, "money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back in this kind of action." It was upon this ground, and this alone, that judgment was given for the plaintiff; and although Mr. Justice Gibbs, in *Brisbane vs. Dacres*, 5 Taunt. R., 144, said: "I cannot think Lord Mansfield said 'mistake of law,'" yet no mistake of fact existed, and the only mistake in the case was a mistake of law. Lord Mansfield, therefore, must be regarded as referring only to a mistake of law; and the case of *Bize vs. Dickason* is a direct authority for the principle, that where money is paid under a mistake of law, which there was no ground to claim in conscience, it may be recovered back. The point was necessarily involved in that case, and expressly decided by the court.

The case of *Bilvie vs. Lumley*, 2 East. R., 469, is usually cited as a leading authority for the doctrine, that where money is paid with a knowledge of the facts, but under a mistake of the law, it cannot be recovered back. The authority of this case is questioned in the cases of *Culbreath vs. Culbreath*, *Lawrence vs. Beaubien*, and *Northrop vs. Graves*. The report of it is certainly very unsatisfactory. The case was not argued, and it was disposed of in a manner which shows that it was entitled to but little respect as authority. The language of Lord Ellenborough is so loose and indefinite that it is impossible to determine upon what principle he meant to base the decision.

The case of *Brisbane vs. Dacres*, 5 Taunt. R., 144, is also often cited as authority for this doctrine. Taking the principle of that case to be as it is stated by the reporter, it is not at all inconsistent with

the decision in the case of *Northrop vs. Graves*. The reporter thus states it: "If a person with knowledge of the fact, but under a mistake as to the law, pays over to another, claiming it as a right, money which he was not compellable to pay, he cannot, upon discovering what his legal right was, recover it back, *there being nothing against conscience in the other party's retaining it.*" It may well be insisted that no stronger principle is fairly deducible from the decision in that case. Mr. Justice Gibbs, who went further than either of his brethren against granting relief on the ground of a mistake of the law, said: "Lord Mansfield's *dictum* is, that money paid by mistake, which could not be claimed in conscience, might be recovered back. I have, however, considerable difficulty in saying that there was anything unconscientious in Admiral Dacres in requiring this money to be paid to him, or receiving it when it was paid." Chambre, J., was of the opinion that the plaintiff ought to recover, and sustained his views by an able and elaborate argument. He said: "The plaintiff had a right to it, and the defendant in conscience ought not to retain it. The rule is, that when he cannot in conscience retain it he must refund it, if there is nothing illegal in the transaction; the case is different where there is an illegality." Heath, J., said: It is very difficult to say that there is any evidence of ignorance of the law here." He put his decision on the ground of a voluntary acquiescence in the demand on the part of the plaintiff. Mansfield, C. J., said: "If it was against his conscience to retain this money, according to the doctrine of Lord Kenyon, an action might be maintained to recover it back; but I do not see how the retaining of this is against his conscience. * * * This, then, being so, the admiral doing no more than all admirals do, is it against his conscience for him to retain it? I find nothing contrary to *æquum et bonum* to bring it within the case of *Moses vs. Macfarlane*, it his retaining it. So far from its being contrary to *æquum et bonum*, I think it would be most contrary to *æquum et bonum* if he were obliged to repay it back." It was upon this ground that he denied the plaintiff's right to recover. It is apparent, therefore, that the decision in this case is not at all in conflict with that in the case of *Northrop vs. Graves*.

In the case of *Hunt vs. Rousmanier*, 8 Wheaton R., 215, Marshall, C. J., said: "Although we do not find the naked principle, that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity." Again: "In this case the fact of mistake is placed beyond any controversy. It is averred in the bill, and admitted by the demurrer, that the powers of attorney were given by the said Rousmanier, and received by the said Hunt, under the belief that they were, and with the intention that they should create, a specific lien and security on the said vessels.

"We find no case which we think precisely in point, and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief."

This case came again before the Supreme Court of the United States,

and the decision then made was entirely consistent with the doctrine in the cases of *Northrop vs. Graves*, and *Steadwell vs. Anderson*. The court say: "If all other difficulties were out of the way, the equity of the general creditors to be paid their debts equally with the plaintiff would, we think, be sufficient to induce the court to leave the parties where the law has placed them." 1 Peters' R., 1, 17.

In the case of *Bank of United States vs. Daniel*, 12 Peters' R., 32, 55-6, the court say: "That mere mistakes of law were not remediable is well established, as was declared by this court in *Hunt vs. Rousmanier*, 1 Peters, 15; and we can only repeat what was there said, 'that whatever exceptions there may be to the rule, they will be found few in number and to have something peculiar in their character,' and to involve other elements of decision." There were other elements in that case. (1.) The court expressly say: "The equities of the parties being equal, to say the least, it cannot be against conscience for the appellants to retain their judgment;" and (2) the claim was barred by the statute of limitations. So far as this case goes, it rather sustains than is inconsistent with the doctrine of the case of *Northrop vs. Graves*.

In the case of *Wheeler vs. Smith*, 9 How. R., 55, a release from an heir-at-law to executors, made under a mistake of law and some undue influence, was set aside, though a large but inadequate consideration was paid. There was no fraudulent intent in the transaction on the part of the executors. "The influences operating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely and with a proper understanding of his rights." The release was the result of a compromise, but the undue influence rendered it unconscientious for the executors to retain the benefit of it, and it was declared invalid.

One of the questions submitted to the Supreme Court for their decision, in the case of *Elliott vs. Swartwout*, 10 Peters' R., 137, was, whether a collector is personally liable in an action to recover back an excess of duties paid to him as collector, and by him, in the regular or ordinary course of his duty, paid into the treasury of the United States—he, the collector, acting in good faith, and under instructions from the Treasury Department, and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount given him. To this question the court very properly responded in the negative. But the learned judge who delivered the opinion of the court went further, and said: "The case put in the question is one where no suit will lie at all. It is the case of a voluntary payment under a mistake of law, and the money paid over into the treasury; and if any redress is to be had it must be by application to the favor of the government, and not on the ground of a legal right." It might be sufficient to say of these remarks that they are mere *dicta*. That they are so is sufficiently obvious. But their propriety depends entirely upon the sense in which the learned judge understood the question which he was considering. It is plain, from his subsequent remarks, that he considered the question as presenting a case analogous to that presented by Mr. Justice Gibbs, in *Brisbane vs. Dacres*, 5 Taunt. R., 144, namely, where one man de-

mands money of another as matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum of money voluntarily. Such a case presents no question of mistake either of *law* or of *fact*, and the payment being *voluntary*, and therefore a *gift* to the party receiving it, the money might be honestly and conscientiously received and retained.

But not only was the money in this case paid for duties not imposed by law, under an actual mistake of the law, made directly with reference to the law itself in a manner which renders it unconscientious for the United States to retain it, but it was paid under a moral duress, and for that reason cannot be regarded as voluntary. The parties did not stand on an equal footing. The property of the petitioners was in the possession of the collector, and the only means by which they could regain it was either to pay the duties unlawfully demanded, or to tender the amount actually due, and institute an action at law against the collector for its recovery. The horns of a dilemma were presented to them, and they were allowed perfect *freedom* of will to impale themselves on whichever they pleased. The alternative presented to them was but the choice of two evils, both of which were illegally imposed upon them. To say that a commercial man, the success of whose business depends upon the activity with which it is prosecuted, in submitting to an unlawful demand of duties under such circumstances, makes the payment *voluntarily* and *gives* the money to the United States, is, it seems to us, a gross perversion of both truth and justice. A payment cannot be a *gift* unless it be *voluntary*, and it cannot be *voluntary* unless it be made in the exercise of a *free* will. There is no freedom of volition in such a case. From the time of the leading case of *Astley vs. Reynolds*, 2 Strange R., 915, down to that of *Steele vs. Williams*, 20 Eng. Law & Eq. R., 319, the authorities have been uniform and consistent that such a payment is involuntary, and the money may be recovered back.

In the case of *Astley vs. Reynolds*, the plaintiff pawned his goods with the defendant, and, in order to regain possession of them, paid him usurious interest. He was allowed to recover the excess over the legal interest. "We think, also," said the court, "that this is a payment by compulsion. The plaintiff might have such an immediate want of his goods that an action of trover would not do his business. Where the rule, *volenti non fit injuria*, is applied, it must be where the party had his freedom of exercising his will, which this man had not." 2 Strange R., 916.

The case of ——— *vs. Pigott*, mentioned by Lord Kenyon in *Cartwright vs. Rowley*, 2 Esp. N. P. C., 723, was an action brought to recover back money paid to the steward of a manor for producing at a trial some deeds and court rolls, for which he had charged extravagantly. The objection was taken that the money had been voluntarily paid, and so could not be recovered back again; but, it appearing that the party could not do without the deeds, so that the money was paid through necessity and the urgency of the case, it was held to be recoverable. See, also, *Parker vs. Great Western R. Co.*, 7 Mann. & Gr. R., 292.

In the case of *Close vs. Phipps*, 7 Mann. & Gr., 586, the solicitor

of a mortgagee, with a power of sale, refused to stop the sale, though the principal and interest of the debt, together with the defendant's costs, were tendered, unless the mortgager would pay expenses, with which she was not properly chargeable. The amount being paid under protest, it was allowed to be recovered back: "The money was obtained by what the law would call *duress*—as the plaintiff was obliged either to pay it or to suffer her estate to be sold, and incur the expense and risk of a bill in equity."

In the case of *Shaw vs. Woodcock*, 7 Barn. & Cress. R., 73, Bayley, J., said: "If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion and may be recovered back." In the same case, Holroyd, J., said: "Upon the question whether a payment be voluntary or not, the law is quite clear. If a party making the payment is obliged to pay, in order to obtain possession of things to which he is entitled, the money so paid is not a voluntary but a compulsory payment, and may be recovered back; and if the plaintiff below, therefore, was compelled to make the payment in question in order to get the policies of insurance, whether there was a pressing necessity or not, he has a right to recover it back."

In the case of *Boston and Sandwich Glass Co. vs. City of Boston*, 4 Metcalfe R., 181, it was held, that payment of taxes to a collector, who has a tax-bill and warrant in the form prescribed by law, is to be regarded as a compulsory payment; and if such taxes were assessed without authority they may be recovered back in an action for money had and received, although the party made no protest before payment. See, also, *Amesbury Woolen and Cotton Man. Co. vs. Inhabitants of Amesbury*, 17 Mass. R., 461, and *Preston vs. City of Boston*, 12 Pick., 7. The rule arises from the power and authority placed in the hands of a collector of taxes, by virtue of his warrant, to levy directly upon the property or person of every individual whose name is borne on the tax-list, in default of payment of the taxes.

In the case of *Oates vs. Hudson*, 6 Wells. H. & G., 346, 348, Parke, B., said: "In *Atlee vs. Backhouse*, 3 M. & W., 633, it is correctly laid down, that in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; but that where a sum of money is paid simply to obtain possession of goods which are wrongfully obtained, that may be recovered back, for it is not a voluntary payment. *Pratt vs. Vizard*, 5 B. & Ad., 808, is an authority to the same effect."

In the case of *Ripley vs. Gelston*, 9 Johns. R., 201, tonnage money wrongfully demanded by the collector of the plaintiff as a condition of the clearance of his vessel, and paid in order to obtain the clearance, was recovered back of the collector. And so in the case of *Clinton vs. Strong*, *ibid.*, 370, money paid by the plaintiff to a marshal for costs which were illegally demanded, in order to obtain possession of their vessel, was recovered back. The court say: "The payment of the costs could not be considered a voluntary act. They

were exacted by the officer, *colore officii*, as a condition of the redelivery of the property. It would lead to the grossest abuse to hold a payment made under such circumstances a voluntary payment, precluding the party from contesting it afterwards."

In the case of *Steele vs. Williams*, 20 Eng. Law & Eq., 319, the plaintiff applied to the defendant, a parish clerk, for liberty to search the register-book of burials and baptisms. He told the defendant that he did not want certificates, but only to make extracts. The defendant said the charge would be the same, whether he made extracts or had certificates. The plaintiff searched through four years and made twenty-five extracts, for which the defendant charged fees, which the plaintiff paid. Held, that the charge for extracts was illegal, and that the payment was not voluntary, so as to preclude the plaintiff from recovering back the money. Barons, Platt, and Martin concurred in the opinion, that when money is paid under an illegal demand, *colore officii*, the payment can never be voluntary.

In the case of *Alston vs. Durant*, 2 Strobbart's R., 257, it was held, that the payment of money exacted by a sheriff, *colore officii*, beyond his legal fees as a condition of the delivery of the plaintiff's runaway slave, is not a voluntary payment, precluding the plaintiff from contesting it afterwards. The learned judge who delivered the opinion of the court, said: "It will appear hereafter that we attach much consequence to the fact that the party defendant here was a sheriff, and, as it appears to us, should be regarded as acting *colore officii*, and not *virtute officii*, in demanding and receiving a sum of money to which he was not entitled. In my opinion, however, there is both reason and authority for the principle, as applicable to persons in their private individual relations, that if undue advantage be taken by one of another's situation, the first having property of the last in his possession which he illegally retains, and refuses to deliver unless a sum of money be paid to him to which he has no legal or conscientious right, this is a fraud, a species of compulsion, and the money ought to be recoverable." *Ibid.*, 260. Upon a review of the authorities he came to the following conclusion: "I think, therefore, there is warrant enough, upon authority, to say that where one man, in any capacity, avails himself of the possession of another's goods, to wring from that other an unlawful payment of money as the condition, and the only one, upon which the goods will be restored, such payment shall not be voluntary in the eye of the law." *Ibid.*, p. 264.

In further commenting on that case, the learned judge said: "For all essential results, here was a public officer acting as a judge in his own case, with power to enforce his judgment, or else to drive the adverse party to a much greater sacrifice, it may be, and thus wresting from the citizen a sum of money which *ex æquo et bono* he could neither receive nor retain. There must be a clear difference between the case of a public officer withholding, of his own mere motion, the rights of a private person, and the demand of one private citizen against another, with no power beyond the ordinary modes of legal proceeding to vest and enforce it, acquiesced in though unlawful." *Ibid.*, 265.

Other cases to the same effect might be cited, but these are deemed

sufficient to sustain the declaration with which we set out, that from the time of the leading case of *Astley vs. Reynolds* down to that of *Steele vs. Williams*, the authorities have uniformly and consistently sustained the doctrine, that a payment made under circumstances like those of the present case is compulsory, and the money may be recovered back.

It seems to us, therefore, that the petitioners are entitled to relief. We shall report to Congress a bill in favor of the petitioners for the sum of two thousand and sixty-eight dollars.

STURGES, BENNET & CO. *vs.* THE UNITED STATES.

Judge Blackford's dissenting opinion :

Suit for overpaid duties.

I dissent from the final judgment rendered in this case by the majority of the court in favor of the claimants.

The ground of my dissent is, that the duties sued for were paid without protest. (See act of Congress of 1845, 5 Stat. at Large, 727 ; *Marriott vs. Brune*, 9 Howard, 619, 636 ; *Lawrence vs. Caswell*, 13 Howard, 488, 496.)

The reasons for my dissent are given at length in the opinion heretofore delivered by me, in this case, on the question as to the validity of the petition ; which opinion is hereto appended and made part of this opinion.

The dissenting opinions heretofore delivered by me in the cases of *Beatty's Executor vs. The United States*, *Spence & Reid vs. The United States*, and *Wood vs. The United States*, are also hereto appended, and referred to as a part of this opinion.

BEATTY'S EXECUTOR *vs.* THE UNITED STATES.

Dissenting opinion, delivered by Judge Blackford :

I dissent from the judgment of the court in this case.

The petition, which is attached to this opinion, does not allege that the duties sued for were paid under protest.

The only question, therefore, which need be considered is, Whether overpaid duties, paid without protest, can be recovered back by a suit in this court ?

That question ought, in my opinion, to be decided in the negative.

The opinion on this subject, delivered by me a few days ago, in *Sturges and others vs. the United States*, is annexed to this opinion, and is to be considered a part of it.

The act of Congress of 1845, referred to in that opinion, after saying that nothing contained in the second section of the act of the 3d of March, 1839, "shall take away, or be construed to take away, or impair the right of any person or persons who have paid or shall hereafter pay money, as and for duties under protest, to any collector,"

&c., concludes as follows: "Nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." (5 Stat. at Large, 727.) In the opinion, in *Sturges and others vs. The United States*, I stated that I considered that act of 1845 to be as applicable to a suit in this court, against the government for overpaid duties, as it is to a suit for that cause, in any other court, against the collector. When that opinion was delivered, I was not aware that the principle just alluded to had been recognized by any of the courts; yet, as it appeared to me so perfectly clear, I did not hesitate to adopt it. But I have since found that the same doctrine—namely, that a suit against a collector for overpaid duties is, in substance, a suit against the United States—had been expressly decided by the circuit court of the United States for the Maryland district. The following is the language of the court:

"For this suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States. The money is in the treasury, and must be paid from the treasury, if the plaintiff recover. And as the United States cannot be sued and made a defendant, in a court of justice, without their consent, they have an undoubted right to annex to the privilege of suing them any conditions which they deem proper. And, in the exercise of this power, they have granted this privilege in the form of a suit against the collector, where duties are supposed to be overcharged, upon condition that the claimant, when he pays the money, shall give a written notice that he regards the demand as illegal, and means to contest the right of the United States in a court of justice; and stating also, at the same time, distinctly, the specific grounds upon which he objects. This is the condition upon which he is permitted to sue the collector, and thus to appeal from the administrative to the judicial department of the government. It is a condition precedent." (*Mason and Tullis vs. Kane*, MSS.)

That opinion was delivered by Chief Justice Taney, and decides that a suit against the collector for overpaid duties is, in truth and substantially, a suit against the United States. And it also decides that such a suit cannot be sustained if the duties were paid without protest.

If that decision is correct, as it undoubtedly is, it shows conclusively that the suit now before this court, which is a suit against the United States for overpaid duties, paid without protest, is forbidden by the act of 1845, and, of course, cannot be sustained.

The claimant's main argument is, that his testator's money has been unlawfully obtained by the government, and that he has, therefore, a right to recover it back. The fallacy of that argument consists in assuming what is not true, namely, the unlawfulness of the collection of the money. The truth is, that the money having been paid without protest, was lawfully received by the collector and by the government.

Congress, as a matter of policy, enacted the aforesaid act of 1845;

and the Supreme Court of the United States have decided, as they were bound to decide, that, according to that act, duties paid without protest are not illegally exacted. (*Lawrence vs. Caswell*, 13 Howard, 496.) The court of claims, like every other court, is bound by the law; and as the act of 1845 has forbidden any suit to be brought against the collector (which, it is decided, would be, in truth, a suit against the United States) for duties paid without protest, this court cannot, whilst that act is in force, sustain a suit against the government for duties so paid.

The act of 1845 fixes a reasonable time within which objections to the duties charged may be made, and says that if the objections are not made within the time, the duties shall not be recovered back. The object of that act is to secure prompt and final settlements relative to the duties, whilst the facts can be easily ascertained, and to prevent the continual disputes and frauds which would be occasioned by delay. The act appears to be founded on sound policy; but whether it is so or not, is a question for the consideration not of the courts but of the legislature.

I am of opinion, for the above reasons, that this suit for overpaid duties, paid without protest, cannot be sustained.

SPENCER & REID, CONSIGNEE AGENTS OF MASON & TULLIS, vs. THE UNITED STATES.

[The petition of the claimants is hereto attached.]

Dissenting opinion, delivered by Judge Blackford:

I dissent from that part of the judgment in this case which sustains the present suit as to certain overcharged duties.

The duties in question were paid to the collector without a written protest setting forth the grounds of objection, and were afterwards paid by the collector into the treasury of the United States.

The decision of the court is, that duties paid without such protest may be recovered back by a suit in this court. That decision is, in my opinion, contrary to the act of Congress of 1845, chapter 22.

The dissenting opinions delivered by me in the cases of *Sturges, Bennet & Co. vs. The United States*, and of *Beatty vs. The United States*, are hereto attached and made part of this opinion.

Mason & Tullis, for whose use this suit is brought, sued the collector in Baltimore for overcharged duties on the same pimento mentioned in the present petition. The circuit court of the United States decided in that case that the suit was, in substance, a suit against the United States; and that "*the money was in the treasury, and must be paid from the treasury, if the plaintiff recover.*" They also decided that the suit would not lie, because there was no legal protest. (*Mason & Tullis vs. Kane*, circuit court of the United States for the Maryland district, April term, 1851.) That decision is in direct opposition to the

present decision of this court in substantially the same case. The consequence of the judgment in this case is as follows: A merchant sues the collector in a circuit court of the United States for overcharged duties. The effect of the suit, if successful, is to obtain from the treasury of the United States the amount of those duties. But the suit fails for *the want of a legal protest*. The same merchant then turns round and sues the United States, in the court of claims, for the same duties, and recovers *without such protest*. One court decides that the treasury of the United States is liable upon the same state of facts on which the other decides that the treasury is not liable. It is impossible that these contradictory decisions can both be right.

The act of 1845 prescribes the condition upon the performance of which, and only upon such performance, a suit will lie for overpaid duties. That condition is, the making of a legal protest within the proper time. The policy of the act is very clear. It is noticed by Chief Justice Taney, in the following words: "Now the act of February 26, 1845, in express terms, provides that no action of this kind shall be maintained against a collector, 'unless the said protest was made in writing, and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.'"

"It is not, therefore, sufficient to object to the payment of any particular duty or amount of duty, and to protest in writing against it. The claimant must do more. He must set forth in his protest the grounds upon which he objects, distinctly and specifically. And these latter words are too emphatic to be regarded as mere surplusage, or to be overlooked in the construction of this law. The object of this provision is obvious. In the multitude of collection offices in the United States, and the changes which so frequently take place in the officers, mistakes and oversights will sometimes take place, and irregularities in the assessment of duties. And the object of this provision is to prevent a party from taking advantage of such objection when it is too late to correct them, and to compel him to disclose the grounds of his objection at the time when he makes his protest. The case before the court strikingly exemplifies the policy of this provision. One of the objections is, that the merchant appraisers did not actually inspect the pimento. It was not actually looked at and inspected by these appraisers, because there was no controversy about its quality. The consignees had notice and appeared before the merchant appraisers, and did not suggest that there was any defect in the quality which would lower the value, nor express a wish to have it inspected. They offered to prove that it was bought for the price at which it was invoiced, and that such was then the market price at the place where it was purchased. The appraisers were satisfied that it was bought at the price stated, but were of opinion that the price was lower than its market value in the principal markets of the island, and appraised its dutiable value accordingly.

"There is not the slightest reason to suppose that their assessment would have been, in any degree, influenced or changed by the actual inspection of the article. And if this objection had been stated in the protest, the error could have been immediately corrected before

the duties were exacted ; but it is now too late. And if this oversight be fatal to this appraisement, and renders it invalid, then the public lose not only the enhanced duties to which the pimento was liable, but also the additional or penal duty which was the consequence of the merchant appraisal. The same may be said of the other grounds of objection above mentioned. If they had been set forth in the protest as the grounds of objection, and had been deemed tenable by the administrative department, the errors could have been corrected without the expense of litigation, and the duties which (the) law imposes secured to the public. And it is for this purpose that the act of 1845 requires the grounds of objection to be distinctly and specifically set forth in the protest. For this suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States." (*Mason & Tullis vs. Kane*, above cited.)

That opinion shows very clearly that the said act of 1845 is founded in sound policy. But whether it be so not, no court can repeal it. Whilst it is in force it must be obeyed.

The only argument in the present case made by the claimants that appears to me to require an answer, is, that this suit is not against the collector, but is against the United States. That argument admits of a short and conclusive answer. It is this: The law is settled by said decision of the United States court, that a suit against the collector for overcharged duties is, in truth, a suit against the United States. So that, according to that decision, which is certainly correct, the mere fact that this suit is against the United States, and not against the collector, is no reason that the suit should be sustained.

I must be permitted to repeat here what was said by me in *Sturges, Bennet & Co. vs. The United States*, namely, that the Supreme Court of the United States has decided that duties paid without a legal protest are not illegally exacted. (*Lawrence vs. Caswell*, 13 Howard, 488, 496.)

When the claimants contend that the duties in question ought not to be retained in the treasury, they forget that those duties are so retained, not for the money involved, but in obedience to the statute of 1845, which Congress, for wise purposes, has thought proper to enact. They forget that, as regards the collection of duties on imports, Congress has the right to prescribe by law what rules it thinks proper ; and that all persons who choose to import goods subject to duty must conform to the rules which the law prescribes.

My opinion, therefore, is, that the petition shows no ground for relief.

DAVID WOOD vs. THE UNITED STATES.

Dissenting opinion, delivered by Blackford, J. :

This is a suit for overcharged duties. The particulars of the claim will sufficiently appear from the following extract from the petition :

"Your petitioner respectfully represents, that during the years 1847, 1848, 1849, 1850, and 1851, he imported into the United States

certain quantities of liquors in casks, on which importation duties were imposed and paid by him to the United States, not only on the value of the quantity of liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation, which was lost—which did not exist at the time when the duty was imposed—which was not and could not be imported into the United States. Your petitioner claims a return of the moneys exacted from him as import duties on such leakage or non-imported liquors."

There is no allegation in the petition that any objection whatever was made to the payment of the said duties.

No evidence has been taken in the case; and the only question now before the court is, whether the petition shows a good cause of action. The decision of a majority of the court is, that the petition is sufficient. From that decision I dissent. The ground of my dissent is, that the duties in question were paid without objection. The dissenting opinions heretofore delivered by me in the cases of *Sturges, Bennet & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*, are referred to as a part of this opinion. In the examination of those cases, I became entirely satisfied that the act of Congress of 1845, cited and relied on by me, was a bar to the claims; and as I consider that act to be a bar in those cases, I, of course, consider it to be a bar in this case.

Since the judgment of the majority of the court in the present case was rendered, I have met with a decision of the district court of the United States for the eastern district of Pennsylvania, which clearly shows that, even *before the act of 1845*, overcharged duties paid without objection could not be recovered back from the United States. Such payments made without objection are what the law denominates voluntary payments; and the law is well settled that money so paid cannot be recovered back. This principle not only applies to the present case, but is also applicable to the aforesaid cases of *Sturges, Bennet & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*. The decision of the district court of the United States, above alluded to, is as follows:

An action was brought by the United States against Clement & Newman on a custom-house bond, dated 30th of June, 1841, conditioned for the payment of \$793, that sum being part of the duties charged on an invoice of molasses imported by the defendants from Cuba into Philadelphia. The defendants claimed, among other things, a set-off of \$345 22, being an alleged overcharge of duties previously paid by them. Mr. Watts, the district attorney, said, in his argument, that though the amount claimed there was small, the principle involved the restoration of an immense sum—not only fifteen or twenty thousand dollars, before paid by those defendants, but millions to other importers throughout the United States, paid by them voluntarily and without protest. * * * * * To the second credit the defendants ask for, we reply, first, that is covered by the same objec-

the duties were exacted ; but it is now too late. And if this oversight be fatal to this appraisal, and renders it invalid, then the public lose not only the enhanced duties to which the pimento was liable, but also the additional or penal duty which was the consequence of the merchant appraisal. The same may be said of the other grounds of objection above mentioned. If they had been set forth in the protest as the grounds of objection, and had been deemed tenable by the administrative department, the errors could have been corrected without the expense of litigation, and the duties which (the) law imposes secured to the public. And it is for this purpose that the act of 1845 requires the grounds of objection to be distinctly and specifically set forth in the protest. For this suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States." (Mason & Tullis *vs.* Kane, above cited.)

That opinion shows very clearly that the said act of 1845 is founded in sound policy. But whether it be so not, no court can repeal it. Whilst it is in force it must be obeyed.

The only argument in the present case made by the claimants that appears to me to require an answer, is, that this suit is not against the collector, but is against the United States. That argument admits of a short and conclusive answer. It is this: The law is settled by said decision of the United States court, that a suit against the collector for overcharged duties is, in truth, a suit against the United States. So that, according to that decision, which is certainly correct, the mere fact that this suit is against the United States, and not against the collector, is no reason that the suit should be sustained.

I must be permitted to repeat here what was said by me in *Sturges, Bennet & Co. vs. The United States*, namely, that the Supreme Court of the United States has decided that duties paid without a legal protest are not illegally exacted. (*Lawrence vs. Caswell*, 13 Howard, 488, 496.)

When the claimants contend that the duties in question ought not to be retained in the treasury, they forget that those duties are so retained, not for the money involved, but in obedience to the statute of 1845, which Congress, for wise purposes, has thought proper to enact. They forget that, as regards the collection of duties on imports, Congress has the right to prescribe by law what rules it thinks proper ; and that all persons who choose to import goods subject to duty must conform to the rules which the law prescribes.

My opinion, therefore, is, that the petition shows no ground for relief.

DAVID WOOD *vs.* THE UNITED STATES.

Dissenting opinion, delivered by Blackford, J. :

This is a suit for overcharged duties. The particulars of the claim will sufficiently appear from the following extract from the petition :

"Your petitioner respectfully represents, that during the years 1847, 1848, 1849, 1850, and 1851, he imported into the United States

excess was charged, or, if charged, that it was paid voluntarily, and without complaint, it is binding on the defendants, and they will not be entitled to the deduction." Verdict for the plaintiffs. *United States vs. Clement & Newman*, Crabbe's Reports, 499 to 515.

In the case just referred to, as before stated, the United States were the plaintiffs, and Clement & Newman the defendants. The defendants claimed, as a set-off, a certain sum as having been paid for overcharged duties. The court decided, in 1843, that if the duties had been paid without objection, the payment was voluntary, and could not be recovered back from the United States. That was the law, as said case decides, after the act of Congress of 1839, and before the act of 1845, relative to overcharged duties. When that decision was made, a verbal objection made at the time of payment was sufficient to enable the party to recover back from the United States, by way of set-off, overcharged duties. But by the act of 1845 no such recovery can be had, unless the objection was made in writing, and the grounds of the objection stated.

The above-mentioned case of the *United States vs. Clement & Newman* was decided by a court of the United States, in which case the government of the United States was itself a party. The decision is entitled to great respect, and I cite it for the purpose of showing that, independently of the act of 1845, there is no foundation for the present claim as described in the petition. That decision is in direct opposition to the judgment of the majority of the court in the present case.

The above are my reasons, in addition to those given in the cases of *Sturges, Bennet & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*, for my dissent, in the present case, from the judgment of the court.

tions as the other ; and, second, that the duties on which it is founded were paid voluntarily, and could not be recovered by the defendants, they having given no proof of compulsion or protest. Mr. Cadwalader, for the defendants, said : Both our claims, for credit or set-off, rest on these reasons, but the second is met by the additional objection that it was a voluntary payment without protest, and is therefore not recoverable against the United States. We reply, that there is evidence of a protest to go to the jury, and that it was not a voluntary payment. It was required as a preliminary to entry, and was exacted *colore officii*, and is therefore not voluntary, and may be admitted as a set-off. The judge (27th of March, 1843) charged the jury as follows :

"If the jury believe that the value of the sugar or molasses embraces all costs and charges at the place of exportation, including the costs of hogsheads, barrels, boxes, &c., necessary to enable the parties to export it, then it will be unnecessary further to consider the question ; should they think otherwise, then a new question arises for their consideration, and that is, were the duties on this shipment paid voluntarily and without objection, in consequence of the parties mistaking the law ; if they were so paid, they cannot be recovered back, or deducted from the claim of the United States. It has been argued that a payment to a public officer cannot be considered as a voluntary payment, as he holds the compulsory power in his own hands. This may be so, where the party paying objects, at the time of payment, to the propriety and legality of the charge. It is not necessary there should be a formal written protest, but there must be some objection, some notice that the claim is disputed, as the ground of objection or dispute may be removed or agreed to ; but if paid without such objection, merely on a mistaken construction of the law, it is binding, and cannot be recovered back, or set off against another demand. Was there any such notice or objection by the defendants at the time of payment ? The only evidence on their part is that of Mr. Newman, who says there was no formal protest, but Mr. Clement informed him there was a mistake in calculating the duties, and that he (Mr. Clement) had been talking to Mr. Kern about it. Mr. Kern, who was a deputy collector, is since deceased, his testimony was not taken in his lifetime, and no witness is produced who heard the conversation. On the other side, Mr. Howell, deputy collector ; Mr. Martin, the cashier ; Mr. Bell, the ascertaining clerk ; and Mr. McAdam, the bond clerk, have all been examined, and each of them say they never heard of any complaint by the defendant ; and Mr. Howell states, that if such a complaint had been made, it would have been within his peculiar duty to examine it ; but he knows of none. Still, this is a question of fact for the jury, and it is their province to decide it, the burden of proof being on the defendants. If you are satisfied that a duty was charged on the boxes, or hogsheads, over and above the value of the sugar, or molasses, at the time and place of exportation, and that such excess was paid by the defendants, they at the same time protesting or complaining against the justness or legality of the demand, then they are entitled to deduct the amount of such excess from the sum claimed in this suit. If, however, you believe that no

excess was charged, or, if charged, that it was paid voluntarily, and without complaint, it is binding on the defendants, and they will not be entitled to the deduction." Verdict for the plaintiffs. *United States vs. Clement & Newman*, Crabbe's Reports, 499 to 515.

In the case just referred to, as before stated, the United States were the plaintiffs, and Clement & Newman the defendants. The defendants claimed, as a set-off, a certain sum as having been paid for overcharged duties. The court decided, in 1843, that if the duties had been paid without objection, the payment was voluntary, and could not be recovered back from the United States. That was the law, as said case decides, after the act of Congress of 1839, and before the act of 1845, relative to overcharged duties. When that decision was made, a verbal objection made at the time of payment was sufficient to enable the party to recover back from the United States, by way of set-off, overcharged duties. But by the act of 1845 no such recovery can be had, unless the objection was made in writing, and the grounds of the objection stated.

The above-mentioned case of the *United States vs. Clement & Newman* was decided by a court of the United States, in which case the government of the United States was itself a party. The decision is entitled to great respect, and I cite it for the purpose of showing that, independently of the act of 1845, there is no foundation for the present claim as described in the petition. That decision is in direct opposition to the judgment of the majority of the court in the present case.

The above are my reasons, in addition to those given in the cases of *Sturges, Bennet & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*, for my dissent, in the present case, from the judgment of the court.

ESTATE OF JAMES BEATTY.

[To accompany bill C. C. No. 19.]

JULY 28, 1856.

The COURT OF CLAIMS submit the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of the Estate of James Beatty *vs.* the United States:

1. The petition of the claimant and claimant's brief.
2. Opinion of the court on preliminary question, delivered by Judge Scarborough.
3. Judge Blackford's dissenting opinion on same question.
4. Depositions in the case, transmitted to the House of Representatives.
5. Statement from the Treasury Department, with a statement of the claimant, transmitted to the House of Representatives.
6. Opinion of the court on the facts.
7. Judge Blackford's dissenting opinion on the facts.
8. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this tenth day of July, A. D. [L. S.] 1856.

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Court of Claims:

The petition of George J. Beatty, executor, of the city of Baltimore, respectfully represents, that James Beatty, late a merchant, of Baltimore, imported from Calcutta into Baltimore, in January, 1845, by the barque Active, 3,197 bags of saltpetre, usually denominated crude saltpetre, and made due entry of the same, for consumption, at the collector's office, and in his entry he erroneously and by mistake, and

for want of a knowledge of the character thereof, described 2,197 bags of the same as "partially refined saltpetre," and 1,000 bags as "crude saltpetre," and free from duty, whereas the entire importation of 3,197 bags was crude saltpetre.

The revenue officers of the port, on examination, reported the entire importation, "saltpetre partially refined, 669,410 pounds," and a duty was exacted of said Beatty by the collector of the port, as for duties due to the United States, upon the entire quantity so reported, of one-fourth of one cent per pound, under the tariff act of 1842, amounting to \$1,548 52; and said Beatty was required to pay, and did pay, the same in order to obtain possession of his merchandise aforesaid, but protested, nevertheless, against the exaction of any duty on the 1,000 bags of saltpetre by him described in his entry as "crude saltpetre."

Afterwards he instituted a suit in the United States circuit court, at Baltimore, (*James Beatty vs. William H. Marriott, collector*), for the recovery of the money paid under protest as aforesaid, and prosecuted the same to judgment.

On the trial, it was contended on the part of said Beatty that the entire importation of saltpetre imported and entered so as aforesaid was crude saltpetre. That among merchants and dealers there were but two descriptions of saltpetre commercially known, viz: "refined saltpetre" and "crude saltpetre." That the term "saltpetre partially refined" was a term known only in the tariff act and among the officers of the customs, and the evidence on the trial corroborated such view of the case.

The court (Chief Justice Taney) said the commercial terms used in the tariff act of 1842 must be construed as used among merchants and dealers to describe the articles upon which the duties were imposed, and the term "crude saltpetre" must be construed to include all the saltpetre of commerce not provided for by the said act as "refined saltpetre." That Congress could not, by the use of commercial names unknown to commerce, impose a duty upon "saltpetre partially refined," unless it had specified what amount of impurities was to be found in the article denominated by the act "saltpetre partially refined;" and he charged the jury, "If the jury find, from the evidence in the case, that the article in question was, at the time of the passage of the act of 1842, and before and ever since, and still is, well known in commerce in the ports of the United States and elsewhere as crude saltpetre, it was entitled to be admitted free of duty; and the plaintiff is entitled to recover back the duty paid on it." The jury found in favor of the plaintiff Beatty, and the custom-house officers adjusted the amount recovered, and found it to be \$461 11, which sum was refunded and paid to said Beatty on or about the 21st day of April, 1847.

From all which it follows, that had said Beatty protested against the payment of any duty on his said importation, he would have recovered the entire amount (\$1,548 52) exacted by the collector so as aforesaid.

And your petitioner further says: The right of James Beatty, or his executor, to claim and receive the balance of money so paid, as

above stated, has not been alienated by assignment or operation of law.

On the 4th of October, 1847, John Ely, as attorney for James Beatty, applied to the Treasury Department for instructions, to be addressed to the collector of the customs, at Baltimore, requiring him to certify to the facts in relation to the duties paid by said Beatty, upon his importation of saltpetre, by the barque Active, as the same were recorded in his office, in answer to which application instructions were granted on or about the 3d of May, 1848; and the collector soon after, on or about the 8th of May, certified to the claim of said Beatty, that the duties paid on the importation were \$1,548 52, and that \$461 11 of the same had been refunded in satisfaction of a judgment of court, and said collector transmitted to the Treasury Department a statement of said claim by him certified, together with a statement of the facts of the case, prepared by William L. Marshall, United States district attorney; and soon after John Ely, attorney for said Beatty, asked the Secretary of the Treasury to pay said claim to said Beatty, and the Secretary referred the claim to the First Comptroller, McCulloh, for his action thereon; and said Comptroller omitted and neglected to act on the same (although often requested) so long as he remained in office. Afterwards Secretary Meredith referred said claim to the Solicitor of the Treasury, R. H. Gillett, for his examination and report, who, after a careful examination, reported in favor of said Beatty, and Secretary Meredith was requested to pay said Beatty's claim. The Secretary did not act upon the case until February 1st, 1850, when he decided, "that the claim of Mr. James Beatty, for an alleged excess of duty exacted on saltpetre, amounting to \$1,087 41, is found to be inadmissible under the laws."

Your petitioner is advised and believes, that under the tariff act of August 30th, 1842, (5 Statutes at Large, 548,) the saltpetre imported by James Beatty was admissible to enter free from duty, and that the decision of the court in the case before mentioned has settled the question, inasmuch as the entire importation of saltpetre, by the barque Active, was alike crude saltpetre, and that, under the act of August 8th, 1846, section 2d, (9 Statutes at Large, 676,) Secretary Meredith was authorized to refund the duties exacted as aforesaid unto said James Beatty.

Your petitioner further says, that the before mentioned sum of fifteen hundred and forty-eight dollars and fifty-two cents (\$1,548 52) was paid to the collector aforesaid, for the use of the treasury of the United States, and the same was by the said collector accounted for and paid over to the treasury of the United States.

Your petitioner further shows, that on the 5th day of October, 1851, James Beatty, aforesaid, departed this life, and on the 10th day of October, 1851, letters testamentary, under the will of James Beatty, were granted to your petitioner and James Beatty, jr. Wherefore, your petitioner, relying upon the justice of this claim, and the constitution of the United States, which provides that private property shall not be taken for public use without just compensation, (1 Statutes at Large, 21,) humbly prays this honorable court to grant such relief, by a bill in favor of your petitioner, as may be, in the judgment

ESTATE OF JAMES BEATTY.

of your honorable court, suitable and necessary, in order that the said sum of ten hundred and eighty-seven dollars and forty-one cents may be refunded with interest on the same from the day of payment.

BALTIMORE, *June 30, 1855.*

GEORGE J. BEATTY,
Executor of James Beatty, deceased.

Statement of duties exacted on saltpetre imported by James Beatty into the port of Baltimore.

Date of entry.	Name of vessel.	Where from.	Description of goods and quantity.	Specific duty.	Duty exacted at $\frac{1}{2}$ ct. per lb.
1845. Jan. — 1847. April 21	Barque Arctic	Calcutta	2197.1000 bags saltpetre, weighing 669,410 lbs.	Duty charg'd at $1\frac{1}{2}$ cts.	\$1,548 52
	Refunded amount of judgment.....				461 11
1855 June 30	Balance claimed.....				1,087 41
	Add interest on above at 6 per cent. from February 1, 1845				
	Total amount claimed.....				

GEORGE J. BEATTY,
Executor of James Beatty, deceased.

STATE OF MARYLAND, }
City of Baltimore. } ss.

George J. Beatty, of said city, being sworn, says he has read the foregoing, and the facts stated in the petition are true to the best of his knowledge and belief.

GEORGE J. BEATTY.

Sworn to before me this thirtieth day of June, 1855.

JOHN HANAN,
U. S. Commissioner for District of Maryland.

CHAS. E. SHERMAN,
Attorney.

Brief of legal points and authorities, in behalf of the petitioners, under the twentieth rule.

ESTATE OF JAMES BEATTY	}	No. 49.
<i>vs.</i> THE UNITED STATES.		
SPENCE AND REID	}	No. 52.
<i>vs.</i> THE UNITED STATES.		
EDMUND W. TRYON	}	No. 352.
<i>vs.</i> THE UNITED STATES.		

In the above entitled cases the facts are sufficiently set forth in the petitions on file in this court.

In behalf of the petitioners it will be contended, on the cases as shown in the petitions, that the petitioners are entitled to the redress prayed for.

We hold that all men are under an implied obligation to deal fairly, justly, and according to law, and to be ready, willing, and desirous to correct any and all mistakes and errors; and this is more especially incumbent upon and expected of those persons who, by reason of intelligence, education, social position, or official station, are elevated above the masses. *But above all, the government*, through its officers, should set an example of truth, equity, honesty, and fidelity in all its official acts, accountings, dealings and contracts; and if any wrong be done or law be violated by its agents acting in its behalf, the government owes it to itself at once, and of its own accord, to redress the wrong and cause the majesty of the law to be vindicated.

Courts of justice are instituted to redress wrongs, and to expound and apply the law; and the government is to answer for the official acts of its officers and agents before the Court of Claims, and abide by its judgment.

On the part of the United States the solicitor has filed his objections, in which he contends that the petitioners do not state a proper case for the action of this court. His points may be stated as follows viz:

1st. The money the petitioners pray may be refunded was paid *voluntarily*, as for duties due to the United States; and

2d. Because if the money so paid was more than the statute authorized to be collected, still it was not illegally exacted; for, "where no protest is made, the duties are not illegally exacted." See brief of the U. S. Solicitor in the cases (No. 65) of Sturges, Bennet & Co., and (No. 62) of John Durand & Co.

The *first point* we answer as follows, viz:

The plea of voluntary payment, as between individuals, does not apply in a case like the present. The parties are not in a position to arrange and determine between themselves the amount of duty to be paid and collected.

The law places the imports in the custody of the collector, to be held by him until the importer shall have paid the duties which the statute has imposed on the same.

In the case of *Hughes & Guynet vs. Jesse Hoyt*, (Doc. No. 49, page 28, Ho. Reps. 26th Cong., 1st Sess.,) the court said: "The collector arrests the property, and holds it until the owners pay the duty he demands; and when they prosecute to recover such coerced payment, he must show authority of law for his proceeding."

Where a collector of the revenue is not authorized to collect any more or less than a given sum fixed by positive statute, more or less cannot be received without a violation of the statute; which violation must necessarily make such acts illegal and void. In the case of *Adams vs. Bancroft*, 3d Sumner, 384, Story, J., said:

"I may add, in this connexion, that laws imposing duties are never construed beyond the natural import of the language, and duties are never imposed upon the citizen upon doubtful interpretations; for every duty imposes a burden on the public at large, and *therefore* it is construed strictly, and must be made out in a clear and determinate manner from the language of the statute."

There is no mutuality in such payments, and no valid consideration to support an over-payment. If too little is received by the officer, it does not bind the government; if too much, it does not bind the importer. In the case of *Lyman vs. Mason*, Story, J., said: "It is clear that if the collector were to take a bond for more than the legal duties, the importer would be entitled to redress; and why not, in the converse case, the government also?" 1 Mason, 501.

Private individuals have a right to deal and contract, and compromise their legal rights, and in view of the uncertainty of the law, may voluntarily agree to pay and receive more or less than the law requires; both parties being free to act, the law recognises their acts in so doing as not against law; and a *voluntary payment* may be pleaded in bar of a recovery of money so paid. And the authorities cited in the brief of the United States solicitor go no further—establish nothing more.

We are not aware that a case can be found where the principle of voluntary payment, as between individuals, has been holden applicable to officers collecting taxes or duties imposed by positive statute.

In the case of *Maxwell vs. Griswold*, (10 Howard, 255,) Woodbury, J., said: "The government, however, insist that this excess of duty was caused and paid voluntarily, and hence, though illegal, cannot be recovered back." To which the court answered: "But the gist of the point is, were these increased duties in truth paid voluntarily in the meaning of that term as applicable to the present subject?" And page 256: "Now, it can hardly be meant in this class of cases that to make a payment involuntary it should be by actual violence or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment."

The rule is stated in a note to Chitty on Contracts, edition of 1855, page 650, as follows: "In order to constitute an involuntary payment, so that the money may be recovered back, it need not be made

under actual violence or physical duress ; it is enough that the party pay voluntarily in consequence of an illegal demand, and without being able to regain possession of his property except by submitting to the payment ;" and cites *Maxwell vs. Griswold*, 10 Howard, 242 ; *Marriott vs. Brune*, 9 Howard, 619 ; *Ripley vs. Gelston*, 9 Johnson, 201 ; and other cases. See also *Frye vs. Lockwood*, 4 Cowan, 454 ; *Bates vs. N. Y. Ins. Co.*, 3 Johnson's Cases, 241, 242.

In the case of the Bank of the U. S. *vs.* the Bank of Washington, 6 Peters, 19, the court said : " Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it ; and the law, at the very time of payment, creates an obligation to refund it."

In the case of *Hall vs. Mayor, &c.*, of Swansea, 5 Adolphus & Ellis, 547, Lord C. J. Denman said : " The question is, what title they have to retain the money ? and the only title they show is their having taken it. Their wrongful act binds them to return it without any actual promise."

Again : " *If taxes* be erroneously assessed, or be assessed upon a person who is not legally liable, and the same be collected and paid into the treasury of the town or parish by the authority of which the assessment was made, the money so paid may be recovered back in an action against the town or parish for money had and received." *Sumner vs. Parish in Dorchester*, 4 Pick. 361.

Parker, C. J., said : " Now the plaintiff being exempt from taxation, the assessment upon him *was void, and all proceedings under it nugatory* ; so that the money obtained from his property, and placed in the treasury of the parish, was wrongfully taken from him, and cannot be rightfully withheld." Again : " Indeed, upon common principles, the corporation having received the money of the plaintiff, to which they have no right, and placed it in their treasury, must be liable to refund it in this action." *Ibid.*, 364.

" Where money is paid by mistake, under ignorance or forgetfulness of facts, or under a misapprehension of the state of the contract on which the party pays it, if he be not *legally or morally obliged* to pay, it may be recovered back. Nor is it any defence to an action to recover such money that the other party had the means of knowledge." *Story on Contracts*, sec. 422.

So if there be a mutual mistake of the parties in paying and receiving money, it may be recovered in an action for money had and received.

See *Canal Bank vs. Bank of Albany*, 1 Hill, 287 ; *Bank of Commerce vs. Union Bank*, 3 Comstock, 230 ; *Williams vs. Champion*, 6 Ohio R., 169, 170 ; *Rogers vs. Weaver*, 5 Ohio R. 536.

The second point—where no protest is made, the duties are not illegally exacted, &c. We answer as follows, viz :

That is a question to be determined—

1st. By the *constitution*, which provides that " Congress shall have power to lay and collect taxes, duties, imposts, and excises," and that " all duties, imposts, and excises shall be uniform throughout the United States." Article 1, sec. 8, (1 Stat. at Large, 13.) And also " that no person shall be deprived of life, liberty, or *property*, without

due course of law ; nor *shall private property be taken for public use without just compensation.*" Article 5 of Amendments, *Ibid.*, 21.

2dly. To be determined by those statutes made in pursuance of the constitution, whereby the duties in question were imposed and collected.

The United States Supreme Court, in the case of *Elliott vs. Swartwout*, 10 Peters, 153, said : " Any instructions from the Treasury Department could not change the law or affect the rights of the plaintiff," the importer.

In the case of the "*Liverpool Hero*," Story, J., said : " It is very correctly argued that no duties are payable on goods imported into the United States unless expressly provided for by statute." 2d *Garrison*, 188.

Where the statute directs an official act to be done, and prescribes the manner of doing such official act, the act, to be legal, must be none other than that directed, and must be done in the manner required by the statute.

United States vs. two bales of cloth, 3d *Hunt's Merchants' Magazine*, 527. The appraiser, Mead, had not examined the goods, and the court said, " this was not a legal appraisalment."

In *Whitney vs. Emmett*, 1 *Baldwin*, C. C. R. 316, *Balwin*, J., said : " Laws are construed strictly to save a right or avoid a penalty. They are construed liberally to give a remedy or to carry into effect an object declared in the laws ; but if a court, by construction, add an object not so declared, apply the penal provisions of the law to a case not within its definition, or exclude from the remedy a case defined, it is judicial legislation of the most odious kind, necessarily retrospective and substantially and practically *ex post facto*."

" It is by no means unusual, in construing a remedial statute," says a late case, " to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischiefs." *Dwarris on Stats.*, 735.

" Penal statutes receive a strict interpretation. The general words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted." *Ibid.*, 736.

" No man incurs a penalty unless the act which subjects him to it is clearly both within the spirit and the letter of the statute imposing such penalty. ' If these rules are violated,' said *Best*, C. J., in the case of *Fletcher vs. Lord Loudes*, ' the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws.'" *Ibid.*, 737.

All treasury instructions, and all acts of the officers of the customs in obedience thereto, which are other than or contrary to what is prescribed by the statute, are void. In the case of *Tracy & Balestier vs. Swartwout*, 10 Peters, 95, the court said : " The Secretary of the Treasury is bound by the law." See also the case of *United States vs. Lyman*, 1 *Mason*, 504.

The Secretary of the Treasury and the officers of the customs have no authority to demand any rate per cent. of duty other than that which is imposed, nor to determine the quantity or the value of imports whereon to estimate the duties in any manner, except as directed

by the statute. *They are mere ministerial officers.* See 1 Mason, 504; Brune *vs.* Marriott, 9 Howard, 619; Thompson *et al.* *vs.* Greely, 10 Howard, 225; and ex-parte Randolph, 2 Brockenborough, 447.

'If the officers of the customs shall have proceeded as the statute directs, then and only then can the estimated duties be legally considered as *ascertained duties*; and any demand of money by the collector, and payment thereof by the importer, as for duties, unless the collector proceeds as the statute required, is in judgment of law a payment on account of *unascertained duties*, and must be considered as a pledge for duties to be ascertained in pursuance of the statute. See Brune *vs.* Marriott, MS. opinion, U. S. circuit court, Maryland; same case, 9 Howard, 619; Mason *et al.* *vs.* Kane, U. S. circuit court, Maryland circuit, April term, 1851.

In the case of Brune *vs.* Marriott, the Supreme Court said: "Something has been urged in argument on the estimate made by the appraisers, and the final character attached to it. However that may be, if one was made in this case, it could be final only as to the price of the sugar abroad, and not the *quantity or weight* reaching this country. The latter is fixed by another class of *officers, authorized by law for that purpose*; and if the appraisers undertake to fix it, their action in that respect is *coram non jndice, and a nullity.*"

In the case of the United States *vs.* Lyman, (1 Mason, 499,) Story, J., said: "And it is a general rule in the construction of revenue statutes that if a duty is charged on any article, the word 'charged' means that the owner shall be personally debited with that sum." Again: "Suppose, by mistake, the collector takes a bond for a sum less than the real duties, or for a less quantity of goods than is really imported; shall not the government recover the short duties? It is clear that if the collector were to take a bond for more than the legal duties, the importer would be entitled to redress; and why not in the converse case, the government?" Ibid., 501. Again, in same case, page 504: "But the court has been pressed with the usage which has very extensively, and, without question, very innocently prevailed, to allow sub-purchasers after importation to bond the goods at the custom-house in lieu of the original importers. It is sufficient answer to this statement that no usage can prevail against the clear and unambiguous terms of the law. *The collector is but a mere ministerial officer.* It may be his misfortune, or the misfortune of the public, that he misinterprets the law, but certainly he cannot alter it. If it be inconvenient that purchasers should not be permitted to bond goods at the custom-house, it lies with the legislature, and not with collectors or courts of justice, to administer the proper remedy."

Chief Justice Spencer, in Bartlett *vs.* Crozier, (15 John. 254,) stated the great principle that—

"Whenever an individual has sustained an injury by the misfeasance or nonfeasance of an officer who acts or omits to act contrary to his duty, the law affords redress;" and cited "6 Wendell, 462, and Only *vs.* Arnold, 6 Peters, 281."

Judge McLean, in the decision of Supreme Court in Tracy and Balestier *vs.* Swartwout, 10 Peters, 95, said:

"The Secretary of the Treasury is bound by the law; and although,

in the exercise of his discretion, he may adopt necessary forms and modes of giving effect to the law, yet neither he nor those who act with him can dispense with or alter any of its provisions. It would be a most dangerous principle to establish that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress."

"Some personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship." *Ibid.*, 99.

The money in that case was secured by bond received by the collector in his official capacity; the bond being paid, the money went into the treasury. It was an action for damages for illegally detaining the goods; and the government—the real party in interest—by its law officers, the Solicitor of the Treasury and the U. S. district attorney, defended the suit against the collector, in view of which, McLean, J., said: "The government in such cases is bound to indemnify the officer." As if the court had said if the government caused a loss, it shall make it good; if it illegally exacts money, it shall be held to refund the same.

In doubtful cases, as to the rate or amount of duty which the law has imposed, the true rule of construction was given by the United States circuit court for the southern district of New York in the case of *James Hall vs. Jesse Hoyt*. (Ho. Doc., 26th Cong. 1st sess., No. 49, page 33.) In this case the question was whether certain merino shirts and draws, under-garments, were liable, under the act of 1832, to a duty of 50 per cent. imposed on *ready-made clothing*, or to 25 per cent. imposed on *hosiery*.

The court charged the jury as follows, viz: "If, then, these articles might be indifferently placed under either class, and are known in trade as well by the one name as the other, that then they are subject to the lesser duty; because, if the description by which the impost is laid is ambiguous or susceptible of two interpretations, equally conformable to its general import, that one is to be adopted which is least burdensome to individuals. It is not to be supposed that Congress designed to impose the higher rate of duty, where different ones may apply to the same subject, unless they express that intent by plain and definite language."

And the United States district attorney endorsed the rule as follows:

"Being satisfied with this charge, I did not take any exception to it.

"B. F. BUTLER,

"Attorney and Counsel for Defendant."

The verdict being for more than \$2,000, the United States had the right to carry the case to the Supreme Court; by omitting to bring a writ of error, the government adopted the rule as its own.

Liability of principal.—"A principal, by not disavowing the act of his agent, who has transcended his authority, makes the act his own." *Breden vs. Dubarry*, 14 S. & Rawle, 27.

"The principal is liable for the acts of a general agent, acting within the general scope of his authority; and a third person cannot be affected by any private instructions from the principal to his agent." *Munn vs. Commission Co.*, 15 John., 44.

"A corporation is liable for the acts and omissions of its agents in their appropriate duties." *Salem Bank vs. Gloucester Bank*, 17 Mass., 1; *Foster vs. Essex Bank*, 17 Mass., 479; *Lowell vs. Boston & L. R. R.*, 23 Pick., 24; *Thayer vs. Boston*, 19 Pick., 511.

"The liability of the principal depends upon the facts: first, that the act was done in the exercise of, and, secondly, within the limits of, the power designated." *Mech.'s Bank of Alex. vs. The Bank of Columbia*, 5 Wheat., 326.

"In regard to money received by an agent, the general rule is, that the action to recall it must be brought against the principal only, since, in legal contemplation, the receipt was by the principal, with whom the agent was identified." 2d Greenleaf on Ev., sec. 125.

"Principal or master is liable, *civiliter*, for the acts and contracts of his agent or servant, within the scope of his employment." *Chitty on Contracts*, 1855 ed., 213, and note to ditto. See also page 535. The action should be against the principal.

"Lord Mansfield and Baron Perrott, in *Sadler vs. Evans*, (4 Burr, 1986,) both laid down the principle, that when a payment is made to a known agent, the action ought to be brought against the principal, unless in special cases, as under a notice or *mala fide*."

The people of the United States have over and again showed, by acts of Congress, that it is their settled purpose and will that if money be exacted contrary to law by the officers of the customs, as for duties on imports, and paid into the treasury, such money shall be refunded to the person or persons entitled thereto.

See acts of February 19, 1794, to refund duties on imports and tonnage, remitted in consequence of an invalid register of the ship *American Hero*; ditto, of ship *Susan and Polly*, (6 Stat. at Large, 14; ditto, May 19, 1794, of the ship *James*, (6 Stat. at Large, 15.)

See act of March 23, 1796, to refund an excess of duties paid on wines, 6 Stat. at Large, 22.)

See a *general provision* for correcting errors in the liquidation of duties in the act of 1799, sec. 65, (1 Stat. at Large, 677,) which provides, that on a suit to obtain payment of a bond given for duties, the importer, the defendant, may make oath that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed.

See act of February 10, 1803, to refund \$655 90, duties paid on fourteen hogsheads of coffee, duties having been paid twice on the same imports, (6 Stat. at Large, 49;) and act of January 26, 1804, to refund \$6,241 40 of duties on a prize cargo of the brig *Aaron*, (6 Stat. at Large, 51;) and act of April 18, 1814, to refund \$8,304 95, on teas exported in 1805, (6 Stat. at Large, 142.)

See act of April 20, 1818, to refund \$1,381 14 on copper bottoms, not subject to duty, (6 Stat. at Large, 212;) and act of February 18, 1820, (6 Stat. at Large, 237,) to refund \$5,996 68, for the same cause as above.

See acts of 1820, (6 Stat. at Large, 241,) and 1824, (6 Stat. at Large, 305,) to refund duties on goods imported into Castine in 1812 and 1814, while in possession of the British.

See act March 2, 1827, (6 Stat. at Large, 359,) to refund certain duties paid twice in 1817.

See act of March 3, 1827, (6 Stat. at Large, 365,) to refund \$597 24, *with interest thereon*, from January, 1791, to December, 1826; and like acts, (6 Stat. at Large, 474, and 6 Stat. at Large, 484.)

See act of July 14, 1832, (6 Stat. at Large, 525,) to refund duties erroneously collected; and act of June 10, 1834, (6 Stat. at Large, 602,) to refund \$257 22, erroneously collected in 1822, as discriminating duties.

See act of April 4, 1838, (6 Stat. at Large, 709,) to correct a mistake in paying money into the treasury, and to refund the same; and act of March 3, 1839, (6 Stat. at Large, 1771,) to refund duties exacted, \$845 22, paid under a *mistake of fact* about the schooner Sea Flower's being an American vessel; and act of March 3, 1841, (6 Stat. at Large, 823,) to refund duties collected on ship Alexandre and cargo, brought in by mutineers, no part of the cargo having been consumed in the United States; and act of August 11, 1842, (6 Stat. at Large, 857,) to refund duties, \$95 26, the Secretary being satisfied the same was *paid without authority of law*; and see many other like acts.

See also the act of 1839, sec. 2, (5 Stat. at Large, 348,) which provides, "That all money paid to any collector of the customs for unascertained duties, or duties paid under protest against the rate or amount of duties charged," may be refunded to the person or persons entitled thereto.

Finally, on the 8th August, 1846, an act was passed, (9 Stat. at Large, 84,) making a general provision for refunding duties illegally exacted, whereby the Secretary of the Treasury was authorized, by section 2d:

"Out of any money in the treasury not otherwise appropriated, to refund to the several persons entitled thereto such sums of money as have been illegally exacted by collectors of the customs, under the sanction of the Treasury Department, for duties on imported merchandise since the 3d of March, 1833: *Provided*, That, before any such refunding, the Secretary shall be satisfied, by decisions of the courts of the United States upon the principle involved, that such duties were illegally exacted: *And provided, also*, That such decisions of the courts shall have been adopted or acquiesced in by the Treasury Department as its rule of construction."

Inasmuch as *by the remedial statute* above cited the Secretary of the Treasury is required to refund duties illegally exacted, whether the same were paid with or without protest, there is, in judgment of law, an implied promise that no protest shall be required.

Protest unnecessary as between the parties in this suit.

The manner in which the point is stated, by quotation, in the brief of the solicitor, viz: "Where no protest is made, the duties are not illegally exacted," is delusive. Here the effect is put for the cause, as though the exaction followed and was caused by the protest, or the

two were simultaneous and constituted one act. The truth is, the exaction is the cause, and the protest is the effect. The omission of protest is not the cause of the exaction. The omission is merely a waiver of the right to maintain a suit against the collector. The exaction is the sole act of the collector, and is legal or illegal, independent of the importer; if it be according to the statute, it must stand; if otherwise, it is null and void. So of the protest—that is the sole act of the importer; if it be according to the statute, it must stand; if otherwise, it is void.

If we refer to the case of Caswell, 13 Howard, 496, and read, the quotation with what precedes will read as follows, viz:

“For the law has confided to the Secretary of the Treasury the power of *deciding in the first instance* upon the amount of duties due on the importation.” And then, in view of the fact that the Secretary is a mere ministerial officer, with power to decide only *in the first instance*, the amount to be then paid, it was added as follows: “And if the party acquiesces, and does not by his protest appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the tribunal to which the law has confided the power of deciding the question.” That is, in obedience to the ministerial officer who is to decide the question in the first instance.

We deny that the Secretary of the Treasury has any judicial power or authority to decide whether or not the acts of himself, and the collector acting under his orders, are legal or illegal; and we do so on the authority and decisions of Barbour, J., and Marshall, C. J., in the case in 2 Brockenborough, 447—the case of *ex-parte* Randolph.

Barbour, J., referred to 10 Coke, 76, and said: “It was settled as early as the great Marshalsea case, and the principle has never been departed from, that where a court has jurisdiction, and proceeds in *verso ordine*, or erroneously, there the proceeding is only *voidable*; but where the court has no jurisdiction of the case, there the whole proceeding is *coram non jndice*, and *void*.” (See page 472.)

Marshall, C. J., in the same case, (pages 479, 480,) speaking of the officers of the treasury, said: “The persons who are directed by the act of Congress to ascertain the debt due from a delinquent receiver of public money, and to issue process to compel payment of that debt, do not compose a court ordained and established by Congress, nor do they hold offices during good behavior. Their offices are held at the pleasure of the President of the United States. They are consequently incapable of exercising any portion of the judicial power, and the act which attempts to confer it is absolutely void. In considering the validity of this act, therefore, it is necessary to discard every idea of its conferring judicial power. We must not view the statement or certificate of the account as a judgment, or the warrant which coerces payment as judicial process. They must be received as mere ministerial acts, performed by mere ministerial agents. They cannot be otherwise sustained.”

“I will, for the present, assume that the power of collecting taxes, and of disbursing the money of the public, may authorize the legislature to enact laws by which the agents of the executive may be empowered to settle the accounts of all receiving and disbursing officers,

and to issue process in the nature of an execution, to compel the payment of any sum alleged to be due. *But these agents are purely ministerial, and their acts are necessarily to be treated only as ministerial acts.* The inevitable consequence is, that their validity must be decided by those legal principles which govern all acts of this character. These require that the authority, whether given by a legislative act or otherwise, must be strictly pursued. Such agents cannot act on other persons, or on other subjects, than those marked out in the power, nor can they proceed in a manner different from that it prescribes."

In the case of *Caswell vs. Lawrence*, the only litigated point of the case in the briefs of Attorney General Crittenden for the United States, and B. F. Butler for the defendant, and the decision of the court also, was whether a certain allowance of 2 per cent. should be made, in pursuance of the act of 1799; and the remarks made by the court about the protest must be understood to have been spoken in reference to that case, and the statute of 1845, which requires a protest to be in writing, and to state specifically the grounds of objection to the payment of the duties. That act makes such a protest the condition on which an importer may maintain an action against the collector. The act of 1846, cited in the case, is the tariff act of July 30, 1846, and not the refunding act of August 8, 1846. The truth is, the refunding act of 1846 does not appear to have been brought to the attention of the court; it was not cited in either of the briefs of counsel, and was not cited by the court. The court did not construe, nor attempt to construe, that act.

The construction contended for in the brief of the solicitor involves the absurdity of making C. J. Taney announce the doctrine, that duties collected in pursuance of treasury instructions are necessarily legally exacted, and will so continue to be, unless the importer who pays them interferes by a protest; and the importer may make that which, when done, was legal, illegal, and he may have remedy against the consequences of his own act, by an action at law against the collector.

When money is demanded by the collector of customs, as for duties due on imports, and as paid under protest, the collector is cautioned that he is to hold the money in trust until the legal right of the government to demand and receive it shall have been determined. And, although by the act of 1839, (5 Stat. at Large, 348,) the collector is required to pay the money into the treasury, still the act of 1845 (5 Stat. at Large, 349) gives a right of action against the collector for the purpose stated in the act, viz: "To ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury touching the same, according to due course of law."

As between principals, there is no necessity for, or use of, a protest; and as to all legal rights between the government and the importer, the act of 1845, in the absence of a protest, left the parties where they were.

The protest does not determine the legal right of the officer to demand the money. There is no law which requires that money paid

into the treasury shall be forfeited, unless the payment be made under protest. The act of 1845 is a remedial statute, and is to be construed liberally, as preliminary to a remedy against the officer, and through him against the government.

In no case has a court determined the legality of the collector's acts by the protest, but, in every case cited, by the statute.

Instructions.—By the act of 1799, sec. 111, (1 Stat. at Large, 704,) it was provided that the officers of the Department of the Treasury may prescribe additions to the forms provided in that act, for the better collection and payment of duties: “*Provided*, however, that it shall not be competent for the said officers to prescribe any forms or regulations incompatible with, or contravening the special provisions of this act.” The act of 1799, in many of its provisions, is still in force for collecting the revenue.

If, in the execution of the law, the treasury erred in its constructions, and required the collectors of the revenue to take more duty than the law imposed, usually it corrected such error, when found out by judicial decisions or otherwise, by a new circular. We might cite a number of erroneous instructions, and instructions to correct the same; one or two may suffice.

By general instructions, dated November 25, 1846, (1 Mayo,) collectors were directed to collect duties upon the quantities of merchandise stated in the invoice, and not upon the quantity returned by the weigher or gauger; if such weigher's or gauger's report showed a deficiency in the quantity stated in the invoice, the instructions were as follows, viz:

“But in no case are the duties to be levied on an amount less than the invoice value.”

The United States Supreme Court having decided, in the case of *Brune vs. Marriott*, (9 Howard, 619,) that the duty was imposed, not upon the quantity as specified in the invoice, but as shown in the return of the weighers or gaugers, the treasury, on the 5th July, 1850, (1 Mayo, addenda, 39,) instructed the collectors of the customs to admit sugar and molasses to entry, and collect the duty in compliance with the decision of the United States Supreme Court, in the case of *Brune vs. Marriott*, (1 Mayo, 39.)

And by another instruction, dated August 10, 1850, (1 Mayo, addenda, 41,) the treasury directed that the errors which had been made under the instructions of November 25, 1846, on imports of sugar and molasses, should be corrected, and the excess of duty exacted illegally, as determined in the suit of *Brune vs. Marriott*, should be refunded. And under instructions of August 10, aforesaid, a large amount of money has been refunded.

The tariff act of 1832 imposed a less rate of duty on some articles of import than the same were liable to pay under the prior acts; and it was provided by the 18th section, (4 Stat. at Large, 594,) that such imports might be placed in the custody of the collector, and the duties re-adjusted, and the difference in duty refunded. And by the same section, the Secretary of the Treasury was authorized “to prescribe such rules and regulations as may be necessary to carry this section into effect.”

And the difference in the duties was adjusted and refunded under instructions of the Comptroller of the Treasury, dated March 7, 1833. And under the same circular, discriminating duties of tonnage on Mexican vessels were refunded.

In treasury circular, dated March 13, 1834, addressed to collectors of the customs, the Comptroller said: "It has been noticed that some of the collectors are in the habit of crediting duties on merchandise in one quarter, the returns in relation to which, by the weighers, gaugers, or measurers, are not forwarded until a subsequent quarter."

* * * "It is requested that in future the returns of the weighers, gaugers, and measurers, be transmitted with the accounts in which the duties are regulated with reference to those returns."

Again, in the Comptroller's circular of September 13, 1836, as follows: "The abstract you are to render of the duties which may be refunded by you may be stated in a similar form with that subjoined to the circular of the 18th February, 1834; instead of '*amount to be refunded*,' say, '*amount refunded*;' and then add a column, headed '*to whom refunded*.'" These extracts are cited to show that the collectors, under instructions of the Treasury Department, corrected errors, and refunded duties collected in excess without requiring any protest, or judicial decision. And for further evidence as to the refunding of duties, see the circulars cited by the brief of the petitioners in case (No. 65) of Sturges, Bennet & Co.

By the tariff act of 1842, sec. 24, (5 Stat. at Large, 566,) it was enacted, "that it shall be the duty of all collectors, and other officers of the customs, to execute and carry into effect *all instructions* of the Secretary of the Treasury relative to the execution of the revenue laws."

If the Secretary errs, and issues instructions which cause more duty to be collected than the law required to be paid, he will certainly be authorized to correct his instructions, and the errors and illegalities caused thereby.

It will hardly be contended that the Secretary can, by a circular, collect money contrary to law, and be unable, and under no obligation, to withdraw such circular, and correct the errors of his officers which may have been caused thereby.

"In case of an erroneous settlement, a bill in equity would lie to surcharge and falsify, as in the case of a settled account between individuals. If even at law, though the settled account would be *prima facie* evidence, might not the true balance be recovered upon proving mistakes and omissions?" (Ex-parte Randolph, 2 Brockenborough, C. C. R. 447; Perkins vs. Hart, 11 Wheat, 237.)

It is contended in the briefs of the United States solicitor, upon motives of public convenience or expediency, that, "if these claims are countenanced it will lead to mischievous consequences, and engender a vicious system of speculation on the government and people."

We answer in the words of Lord Loughborough, in the case of Arkwright vs. Nightingale, Davi's patent cases, 56: "It is said it is highly expedient for the public, that this patent, having been so long in use, after Mr. Arkwright had failed in that trial, should continue to be open; but nothing could be more essentially mischievous than that questions of property between A and B should ever be permitted

to be decided upon considerations of public convenience or expediency. The only question that can be agitated in Westminster Hall is, which of the two parties, in law or justice, ought to recover?"

The constitution provides that Congress shall have power to lay and collect taxes, duties, imposts, and excises, and that all duties, imposts, and excises shall be uniform throughout the United States; and that no person shall be deprived of property without due process of law. There is not, and cannot be, any legal rule whereby duties shall be uniform, but the statutes made for the purpose.

The oath prescribed by the act of 1823, sec. 4, (3 Stat. at Large, 730,) to be administered by the collector to the importer on his making entry of imports, requires the importer to promise as follows, viz: "That nothing has been on my part, nor to my knowledge on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise; and that if, *at any time hereafter*, I discover any error in the said invoice, or in the account now rendered of said goods, wares, and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district." And the act of 1842, sec. 21, (5 Stat. at Large, 565,) is in the words following, viz: "And if any package be found by the appraisers to contain any article not specified in the invoice, [and no fraudulent intent appear,] then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer: * * *Provided*, That if, on the opening of any package or packages of goods, a deficiency of any article shall be found, on examination by the appraisers, the same shall be certified to the collector on the invoice, and an allowance for the same be made in estimating the duties." These provisions of law amount to a solemn promise and contract between the government and the importer, that all errors which may arise in collecting and paying duties shall be corrected without limit of time, "*at any time thereafter*."

Again: There is an implied promise, on the part of the United States, proffered to all importers, citizens, and foreign merchants, made in the tariff act of 1846, (9 Stat. at Large, 42,) that foreign imports shall be admitted into the United States, and delivered to importers to be sold for consumption, upon the payment of the duties imposed by that act; and that the goods, wares, and merchandise, mentioned in Schedule I, shall be exempt from duty.

Again: There is a like promise proffered to all importers, resident and foreign, by the *act to establish a warehousing system*, (9 Stat. at Large, 53,) that they shall be permitted to enter their imports, to be deposited in the public stores, there to be kept with due and reasonable care, at the charge and risk of the owner; and the collector, on an entry to re-export the same, shall permit the said imports to be re-shipped without the payment of any duties thereon. In the case of the petitioners, Spence and Reid, a penalty was exacted on goods warehoused and exported. As well might a penalty be exacted on the free goods mentioned in Schedule I.

By the act of importing foreign imports, the importer accepts the offer made by the government, and thereupon arises a contract to pay

and receive that specific certain sum of money for duties which is imposed by the act of 1846, or to export the merchandise without the payment of duty, as the case may be, binding alike on both parties. The collector is not a party to the contract; his duty is to see that each party do and perform according to contract.

A protest cannot strengthen the law or the contract; the want of one cannot repeal the law nor make void the contract.

If the collector, as collector, exacts more than the law and contract require, it is extortion. And when the government is requested to correct the error and refund the money, the answer of the treasury officer should be, "show me an appropriation and I will pay you the money." But for an officer, sworn to execute the laws, having an appropriation, to refuse to refund, and plead in justification of his refusal the want of a protest, is disgraceful; he adds to extortion insult.

The Supreme Court, in the case of the United States *vs.* Nourse, (9 Peters, 8,) said: "It would excite some surprise, if, in a government of laws and of principle, furnished with a department whose duty is to decide questions of right, not only between individuals, but between the government and individuals, a ministerial officer might, at his discretion, issue this powerful process, and levy on the person, lands, and chattels of the debtor any sum he might believe to be due, leaving that debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States."

Congress, by an act approved February 24, 1855; established a court, to be called a Court of Claims, *to hear and determine all claims* founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by petition filed therein, and report to Congress the cases upon which they shall have finally acted, with a bill, in those cases which shall have received a favorable decision thereof, in such form as, if enacted, will carry the same into effect. Which act, being remedial and for the redressing of injuries suffered by citizens, is to be construed liberally, and so as will redress such injuries.

We aver that the petitioners above named, in their petitions filed in this honorable court, do show that they have claims founded upon laws of Congress, regulations of the Treasury Department, and upon contract; and upon the authority of the acts, decisions of courts, and elementary principles above cited, we contend, that, in all cases where a greater amount of money than the law imposed has been demanded by collectors of the customs, as for duties due to the United States upon imports, and paid by the petitioners in order to obtain possession of said imports, the petitioners are entitled to redress; and we pray this honorable court to grant unto each of them such a judgment and other relief, by bill or otherwise, as in the judgment of this honorable court they may be legally entitled to, in order that the money illegally exacted of them may be refunded.

CHARLES E. SHERMAN,
JOHN ELY,
Counsel for Petitioners.

JAMES BEATTY'S EXECUTOR *vs.* THE UNITED STATES.;

The opinion of the court was delivered by Judge Scarburgh.

James Beatty, late a merchant of the city of Baltimore, imported from Calcutta, into Baltimore, in January, 1845, by the barque Active, 3,197 bags of saltpetre, usually denominated crude saltpetre, and made due entry of the same for consumption, at the collector's office; and in his entry he erroneously, and by mistake, and for want of a knowledge of its character, described 2,197 bags thereof as "partially refined saltpetre," and 1,000 bags as "crude saltpetre," and free from duty, when the entire importation was "crude saltpetre."

The entire importation was reported by the revenue officers as "saltpetre partially refined," and a duty thereon, at the rate of $\frac{1}{4}$ of one cent per pound, amounting to \$1,548 52, was exacted of the importer and paid by him. So much of the duty as was exacted on the 1,000 bags—amounting to \$461 11—was paid under protest, and subsequently recovered in an action instituted by the importer against the collector.

The petitioner alleges, that the whole importation was "crude saltpetre;" that there is no such thing known in commerce as "partially refined saltpetre;" and that, in the commercial sense, all saltpetre is included under two denominations: "refined saltpetre," and "crude saltpetre."

We are obliged, at the present stage of this case, to assume that these allegations are true. The rule is well settled, that the denomination of articles in tariff laws is to be construed according to the commercial understanding of the terms used; and that, whether the imported article is or is not known in commerce by the words or terms used in the tariff law, is a question of fact, and not of law. (*United States vs.* 112 casks of sugar, 8 Peters' R., 277; *Elliott vs.* Swartwout, 10 Peters, 151, 153; *United States vs.* Breed, 1 Sumner R., 164; two hundred chests of tea, 9 Wheaton R., 430; *Curtis vs.* Martin, 3 How. R., 106; *Lawrence vs.* Allen, 7 How. R., 785, 796-7.)

We also assume that, if there be any case to which the statute law concerning protests is fully applicable, this is such case. As, therefore, no protest was made *quoad* the subject now claimed, the question is directly presented for the consideration of this court, whether the want of the protest is conclusive against the petitioners.

In order to present an intelligible view of this question, it is proper to consider it (1,) as if the acts of Congress of March 3, A. D. 1839, and February 26, A. D. 1845, had not been passed; and then (2,) to inquire how far it is affected by those acts.

(1.) First, then, what would be the rights of the petitioner if the acts of 1839 and 1845 had not been passed?

There can be no doubt, taking, as we must for the present, the allegations of the petitioner to be true, that the money now claimed was paid to the United States by James Beatty, upon the supposition that the saltpetre entered "as partially refined saltpetre," was "partially refined saltpetre;" that in fact it was "crude saltpetre;" that, being "crude saltpetre," it was, under the act of 1842, free from

duty ; and that the money would not have been paid if the fact, that the subject on which the duty was assessed was "crude saltpetre," had been known to the importer. This, then, is a case where money, to which the party receiving it was not entitled, was paid under a mistake of fact, and it would not have been paid if the fact had been known to the party making the payment. In such a case, between man and man, the doctrine is too well settled to admit of doubt or question, that an action would lie to recover back the money, and that it would be unconscientious to retain it.

An impression at one time existed that, in order to recover back money paid under mistake of fact, the party must show that at the time of payment he not only did not know the fact, but that he had no means of knowing it. This impression was to some extent countenanced in the case of *Bilbie vs. Lumley*, 2 East. R., 469 ; but it was founded chiefly on the *dictum* of Mr. Justice Bayly in the case of *Milnes vs. Duncan*, 6 Barn. & Cr., 671. It has, however, long since been abandoned. The more just and reasonable doctrine, that the knowledge of facts, which would disentitle a party from recovering, must be a knowledge existing in the mind at the time of payment, is now well established. *Kelly vs. Solari*, 9 Mee. & W., 54 ; *Bell vs. Gardiner*, 4 Man. & Gr., 11. Hence, where a party once had full knowledge of a fact, which he had forgotten at the time of making the payment, his forgetfulness of it was such a *mistake* of fact as entitled him to recover back the money. *Kelly vs. Solari*. In that case, Parke, B., said : "If money is paid under the impression of the truth of a fact, which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact." It may often happen that the possession of the means of knowledge would afford strong evidence of actual knowledge, but there is no conclusive rule of law that, because a party has the means of knowledge, he has the knowledge itself. *Bell vs. Gardiner*. Although, therefore, James Beatty might, by instituting the proper inquiry, have ascertained that there is no such thing known in commerce as "partially refined saltpetre," and that his whole importation was what is denominated in trade "crude saltpetre," yet, if at the time of payment he did not actually know this, he paid the duties thereon under such a mistake of fact as would, if it were a case between man and man, entitle him to recover the money back.

Prior to the act of March 3, A. D. 1839, there were two modes of proceeding in such cases as the present : first, by a suit against the collector ; and second, by petition to the legislative department of the government. If this case had occurred before the passage of the act of 1839, and whilst the money was still in the hands of the collector, the importer had given him notice of the mistake, and that he meant to hold him personally responsible for the money, or, to use what seems to be the technical language applicable to this subject, had protested against its payment, there can be no doubt that an action therefor might have been maintained against the collector. *Elliott vs. Swartwout*, 10 Peters' R., 137 ; *Swartwout vs. Gihon*, 3 How. R., 110. And there can be as little doubt that, although such notice

or protest was essential to the maintenance of the action against the collector, it was in no way necessary to the support of the petition to the legislative department of the government. We speak now of both these modes of proceeding as alike applications for justice; for we hold, that in such a case as the present, a party was entitled, as a matter of right, to relief as much under the one as under the other. The only difference between them was, not in his right to redress, but that in the action against the collector he had an enforceable remedy, whereas, in his petition to Congress, he had not an enforceable remedy.

The right to recover in the action against the collector was based upon a well-settled doctrine of the law of agency, that where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal. It proceeded upon the assumption that the money sued for belonged to the party paying it, and not to the agent's principal. The object of the notice was merely to warn the collector that the party meant to hold him personally responsible for the money. There was no prescribed form in which it was to be given, nor was it necessary that it should be in writing. *Ibid.* The action had its origin in the principles of the common law, and was governed by them. The grounds on which it was maintained are well stated by Mr. Justice Daniel in the case of *Cary vs. Curtis*, 3 How. R., 250. He said: "We all know that this action for money had and received is founded upon what the law terms an implied promise to pay what in good conscience the defendant is bound to pay to the plaintiff. It being in such a case the duty of the defendant to pay, the law imputes to him a promise to pay. This promise is always charged in the declaration, and must be so charged in order to maintain the action. It was upon this principle that the action for money had and received was sustained in the case of *Elliott vs. Swartwout*. There money had been taken by the collector for duties which were not imposed. This money lawfully belonged to the plaintiff. It was the duty, therefore, of the collector to pay it back to him. The collector was not bound to pay it to the treasurer, for the law did not command this disposition of it. It did not belong to the United States, who had no right, therefore, to demand it of him, and could not have recovered it against him in a suit if he had paid it back to the true owner. It being the duty of the collector to return what he had unlawfully taken, the law implied on his part a promise to do so; and on this implied promise, arising or inferred from a duty imposed upon him, the action was maintained. The protest and notice were to him of no farther importance than to warn him to hold over, and to take away an excuse he might otherwise have had from payment to his principal. It was his duty, as the law then stood, not to pay over, but to pay back to the party from whom he had collected without legal authority, when warned that this party should look to him for reimbursement, and not to his principal." These remarks require no comment. They fully sustain the views which we have presented.

If, however, the party had not discovered the mistake, or having discovered it, had not made his protest or given notice to the collector

before the latter had paid the money to the treasurer, no action could have been maintained against the collector; but still the money which had been collected for duties not imposed by law, and which, therefore, did not belong to the United States, could not have become the property of the United States by the mere payment of it to the treasurer. The position that such a payment would have produced such a result cannot be sustained upon any principle of law, or of reason, or of justice, or of Christian morals. How could right have been done between the injured importer and the United States otherwise than by a repayment of the money—the money of the importer, which, by mistake, had fallen into the public treasury? In such a case existing between man and man there is no room for doubt as to the right of recovery; and where it occurred between the government and an individual, the obligation of the government to repay the money rested upon the same principle. There was not, and in the nature of things there could not have been, one measure of justice between man and man, and another between the United States and an importer. The same rule of right and justice governed both cases. As against the United States, although there was no remedy in the ordinary courts of justice, yet an application could have been made by petition to the legislative department of the government—not for a favor, but for justice—not for a mere gratuity, but for a legal right. To retain money thus falling into the public treasury was as unconscientious in the United States as it would have been in an individual who had received money under similar circumstances, and the legal duty or liability to repay it was the same in both.

Such was the law prior to the act of March 3, A. D. 1839.

2. We come now to inquire how far the question, whether the want of a protest is conclusive against the petitioner, is affected by the acts of 1839 and 1845.

The act of 1839 took away the right of action against the collector, (*Cary vs. Curtis*, 3 How. R., 236;) but it did not take away, or in any manner affect or impair, the right of petition to the legislative department of the government; nor is there one syllable in that act which favors the idea that, in order to constitute a legal demand against the United States for the repayment of money paid for duties not imposed by law, a protest is necessary.

The act of February 26, A. D. 1845, is as follows: "That nothing contained in the second section of the act" of March 3, A. D. 1839, "shall take away, or be construed to take away or impair the right of any person or persons who have paid, or who shall hereafter pay, money, as and for duties, under protest, to any collector of the customs, or other person acting as such, in order to obtain goods, wares, or merchandise, imported by him or them, or on his or their account, which duties are not authorized or payable in part or in whole by law, to maintain any action at law against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury touching the same, according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties

paid under protest; nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." 5 Stat. at Large, 727.

Prior to the act of 1839, as we have seen, an action might have been maintained against a collector, provided there was a protest or notice. In that action the importer had the right to have "the legality and validity of" the "demand and payment of duties" ascertained and tried, and "to a trial by jury touching the same, according to the due course of law." This is undeniable. The only object of the notice was to warn the collector not to pay over, and that he would be held personally responsible for the money. The question of "the legality and validity" of the demand and payment of the duties did not depend upon the notice or protest, but altogether upon other grounds. It is true that the failure to make any objection to the payment, or, in other words, to make a protest, might have afforded *evidence* that the payment was *voluntary*; but, according to the principles of the common law which governed the action, the failure to protest could have had no other legal effect or operation upon the question of "the legality and validity" of the "demand and payment" of the duties. It would have had no effect whatever upon that question in the case where the payment was made under a mistake of fact; because such a payment was never regarded as voluntary, in the technical sense of that term. It is obvious, therefore, as we have already shown, that the protest was not *essential* to the validity of the demand against the United States, and was in no respect necessary to support the petition to the legislative department of the government for a repayment of the money. The want of a protest could be used on the hearing of such petition for no other purpose than that for which it could be used upon the question of the legality and validity of the demand of the duties in the action against the collector, namely, as *evidence* that the payment was *voluntary*. We do not mean to be understood as embracing in these remarks the question, whether the failure to make objection to the payment of duties could in any case operate by way of an *estoppel in pais*. That question, whenever it shall arise, must depend upon its own principles, and cannot affect the correctness of the views which we have presented.

The question now to be considered is, did the act of 1845 produce any change in these respects? That act was, to some extent, a declaratory statute. The Supreme Court, in the case of *Cary vs. Curtis*, had held that the act of 1839 took away the right of action against the collector; and the act of 1845 in substance declares that it was not the intention of Congress that the act of 1839 should have that effect. Its terms have already been quoted. As regards the action against the collector, the only essential change which the act of 1845 seems to have made, is to require that the protest shall be "in writing, and signed by the claimant, at or before the payment of the duties, setting forth distinctly and specifically the grounds of ob-

jection to the payment thereof." There is nothing in that act which either expressly or by implication shows an intention to do more. The words used are plain, and we cannot intend that the legislature meant anything more than it has expressed. We do not sit here to enact laws; that important power is intrusted exclusively to the legislative department of the government. It is our business to declare what the law is in the particular case which we are called upon to decide. In the construction of a statute, when words of a plain and definite import have been used, we are not at liberty to disregard them. Where such words are used, the only safe course is to adhere to the words, and to *collect* the intention of the legislature from them. It has been the experience of the most enlightened judges, that it is dangerous to depart from the plain and obvious meaning of the words of a statute. We are not at liberty to *presume* the intentions of the legislature, but we must *collect* them from the words of the statute; and we have nothing to do with the policy of the law. "This is the true sense," says Mr. Dwaris, "in which it is so often impressively repeated, that judges are not to be encouraged to direct their conduct 'by the crooked cord of discretion, but by the golden metwand of the law;' i. e., not to construe statutes by equity, but to collect the sense of the legislature by a sound interpretation of its language, according to reason and grammatical correctness." (1 Dwaris on Statutes, pp. 702, 703.) We are constrained, therefore, to say, that there is nothing in the act of 1845 which indicates an intention to give to the action against a collector a different legal effect from that which it had prior to the act of 1839. The failure to make a protest is no more conclusive against an importer now than it was before the passage of the act of 1845.

But it is supposed that some remarks made by Mr. Chief Justice Taney, in the case of *Lawrence vs. Caswell*, (13 How. R., 496,) militate against these views. Those remarks are as follows: "But it is proper to say, in order that the opinion of the court may not be misunderstood, that when we speak of duties illegally exacted, the court mean to confine the opinion to cases like the present, in which the duty demanded was paid under protest, stating specially the grounds of objection. Where no such protest is made, the duties are not illegally exacted in the legal sense of the term. For the law has confided to the Secretary of the Treasury the power of deciding, in the first instance, upon the amount of duties due on the importation. And if the party acquiesces, and does not by his protest appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal to which the law has confided the power of deciding the question.

"Money is often paid under the decision of an inferior court, without appeal, upon the construction of a law which is afterwards, in some other case in a higher and superior court, determined to have been an erroneous construction. But money thus paid is not illegally exacted. Nor are duties illegally exacted where they are paid under the decision of the collector, sanctioned by the Secretary of the Treasury, and without appealing from that decision to the judicial tribunals

by a proper and legal protest. Nor are they within the principle decided by the court in the case before us."

It must be conceded, that this language should be construed with reference to the case before the court, and considered in connexion with the context. The case was, an action brought against a collector under the act of 1845. The context is as follows: "The duty of 100 *per cent. ad valorem* was chargeable on the quantity of brandy actually imported, and not on the contents stated in the invoices. This over-charge was therefore illegally exacted, and the defendants in error were entitled to recover back the amount." If this language had gone forth to the world unexplained, the learned Chief Justice might have been understood as announcing a principle which he did not mean to announce. Taken by itself, it, in plain and unambiguous terms, declares, that where there is an over-charge of duty, the duty is *therefore* illegally exacted, and the party paying is entitled to recover back the amount. Nothing is said about a protest, or of what character the protest shall be. And yet this language was used in a case occurring under the act of 1845. Without an explanation, the opinion of the Supreme Court might have been understood to be, that a protest is not necessary to sustain such an action. In order, therefore, that the opinion of the court might not be misunderstood, the Chief Justice proceeds to give the explanation, which is to be found in the remarks which have been quoted. The whole object of it was more fully to declare the grounds on which an action, under the act of 1845, can be maintained.

Much stress was laid in the argument of this case upon this language: "Where no such protest is made, the duties are not illegally exacted in the legal sense of the term." It was urged, with great earnestness, that it was used in its broadest and most general sense. But it is clear that it is not to be so understood. Its object was to explain the meaning of that "illegal exaction," which the learned judge had just said would entitle a party to recover back the money paid, in an action against the collector. He accordingly, in substance, says that, to maintain such an action, the law requires a protest, stating specially the ground of objection, and in the sense of that law there can be no illegal exaction without such a protest. This was indubitably his meaning. He would justly be regarded as using language wholly extra-judicial, if he is to be understood in any other sense.

It was urged by the solicitor that the Chief Justice is to be understood as giving an exposition of the act of August 8, A. D. 1846. We think that there is no just ground for supposing that such was his intention. That act in no way related to the case which he was considering. It had not been referred to by counsel, nor was a reference to it necessary to the elucidation of his views. And, besides, if the Supreme Court is to be understood as putting a construction upon the act of 1846, then it follows that, in the opinion of that court, no duties can be duties *illegally exacted* within the meaning of that act, unless they were paid under the protest required by the act of 1845. But many of the cases provided for in the second section of the act of 1846 originated long before the act of 1845, for it expressly em-

braces "such sums of money as have been illegally exacted * * * since the third of March, eighteen hundred and thirty-three." Prior to the act of 1845, it was not usual in a protest to state the grounds of objection, nor was it necessary to do so. The construction, therefore, imputed to the Supreme Court, if adopted, would, in all probability, to a great extent, repeal the act of 1846.

The remarks which refer to the decision of the Secretary of the Treasury, are to be explained in the same way as those which we have already particularly noticed. And, moreover, it was not the intention of the Supreme Court to characterize the decision of the Secretary of the Treasury as a judicial decision; for no part of the judicial power, under the constitution of the United States, can be conferred upon an executive officer. Every ministerial officer is obliged to make a decision, in the first instance, in every case in which he is called upon to act.

If the act which he is required to do be *executive*, and not merely *ministerial* in its character, his decision is final as regards executive action, and no appeal lies from it to the courts, nor can they revise his judgment. *Decatur vs. Paulding*, 14 Peters' R., 497; *Bradshear vs. Mason*, 6 How. R., 92. But it is not conclusive upon the rights of the party interested in the sense in which a judicial decision would be. He would still be entitled to appeal to Congress. 14 Peters' R., 522; *Reeside vs. Walker*, 11 How. R., 272.

It was such a decision on the part of the Secretary of the Treasury to which the Chief Justice referred; and all that he meant to say was, that if the importer does not appeal from it to the judicial tribunals, in the manner prescribed by the act of 1845, he cannot maintain an action under that act against the collector; but in the sense of that act the duties are not illegally exacted.

That the Chief Justice is to be understood as we understand him, is rendered yet more manifest by what was said by him in the case of *Mason and Tullis vs. Kane*, in the circuit court of Maryland. In that case there was a protest, but not such a protest as the act of 1845 requires, and the action failed on that ground. In delivering the opinion of the court the Chief Justice said: "It is unnecessary, therefore, to inquire whether the objections now made would have been valid if set forth in the protest. If improperly charged, it is no doubt yet in the power of the administrative department to do justice to the claimant. But no action can be maintained under the act of 1845." Now, it seems to us, that if it was the opinion of this learned judge, that where there is no protest, duties are not illegally exacted, understanding those terms in their largest and most comprehensive sense, but, on the contrary, however improperly they be charged, or under whatever circumstances they be paid, if there be no protest, the party has no just claim or legal demand against the United States for repayment, he could not have made the suggestion, that nevertheless, in such a case the administrative department would have it in its power to do justice to the claimant. Upon the hypothesis that his opinion goes to the extent contended for, he must have considered that justice had already been done according to law, and did not still remain to be done anywhere—that the claim had been adjudicated and

settled by "the decision of the tribunal to which the law has conferred the power of deciding the question," and the money paid without appeal to a higher tribunal. He surely did not suppose that the administrative department could give relief in a case so circumstanced.

But it is urged that the suit against the collector is substantially a suit against the United States, and that therefore, if a party fails to avail himself of that remedy, he can have no just claim against the United States. In the case of *Mason and Tullis vs. Kane*, to which we have already referred, the following remarks were made by Mr. Chief Justice Taney: "For this suit, although in form against the collector, for doing an unlawful act, is, in truth and substantially, a suit against the United States. The money is in the treasury, and must be paid from the treasury if the plaintiff recover. And as the United States cannot be sued and made defendants in a court of justice without their consent, they have an undoubted right to annex to the privilege of suing them any conditions which they deem proper. And in the exercise of this power they have granted this privilege in the form of a suit against the collector, where duties are supposed to be over-charged, upon condition that the claimant, when he pays the money, shall give a written notice that he regards the demand as illegal, and means to contest the right of the United States in a court of justice; and stating also at the same time, distinctly, the specific grounds upon which he objects. This is the condition upon which he is permitted to sue the collector, and thus to appeal from the administrative to the judicial department of the government. It is a condition precedent." But it must be recollected that this was the very case in which the same distinguished judge said: "If improperly charged, it is, no doubt, yet in the power of the administrative department to do justice to the claimant." We have already shown, that the latter remarks are wholly inconsistent with the conclusion which has been deduced from the former. The consequence of a failure to make a proper protest is clearly and forcibly stated in the concluding sentence of the opinion of the court: "But no action can be maintained under the act of 1845."

The truth is, that in order to give to the act of 1845 the construction contended for on the part of the United States, it would be necessary to insert in it words which it does not contain. It seems to contemplate two modes of reimbursing to an importer money paid for duties not imposed by law—the one by the action of the Secretary of the Treasury, and the other by a suit against the collector. Both these modes, by the express terms of the act, require a protest, in writing, signed by the claimant, stating the grounds of objection. But there is still another mode known to the law, and familiar in the practice of the government. It is by petition to the legislative department of the government, and is not embraced by the act of 1845. In order to embrace it by that act, words must be added thereto, or inserted therein, to the following effect: "Nor shall any money paid for duties, not imposed by law, be refunded by the United States to any claimant, unless, at or before the payment thereof, he make such a protest as is required by this act." To add words like these to a statute is far beyond the power of the judiciary; it falls exclusively within the pro-

vince of the legislature. However much we might suppose that an enlightened public policy requires that such a provision should be made by law, we have no authority to make it. In the construction of a statute, we can only declare what it is, not what it ought to be.

The condition, then, of the petitioner, at the time of the passage of the act of Congress establishing this court was, that he had a just claim against the United States for money paid them by mistake for duties not imposed by law, but no enforceable remedy for its recovery. He had, by reason of the very mistake under which the payment was made, lost his remedy against the collector, and the Secretary of the Treasury had decided that his claim is "inadmissible under the laws." But his right to petition the legislative department of the government still remained in unimpaired vigor; his claim, as at its origin, still rested on an implied contract on the part of the United States to repay him the money. This money was his property, not theirs; and they were obliged, by the ties of natural justice and equity, to refund it; and, being so obliged, the law, according to principles universally acknowledged, (*Cary vs. Curtis*, 3 How. R., 249,) had implied a promise on their part to repay it to him. This promise had not been performed. The money was still in the treasury of the United States, and his right to demand its repayment had not been waived or released. On the contrary, his claim still continued unsatisfied and undischarged. But the act to which we have referred, makes it the duty of this court to "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." (10 Stat. at Large, p. 612.) This case comes within the very words of that act. It is emphatically one of the cases for which it was designed to provide. It is neither more nor less than a claim founded on an implied contract with the government of the United States. It seems to us, therefore, that if it be sustained by proof, the petitioner's right to relief is unquestionable.

Let an order be made authorizing the taking of testimony in this case.

BEATTY'S EXECUTOR vs. THE UNITED STATES.

Dissenting opinion, delivered by Judge Blackford :

I dissent from the judgment of the court in this case.

The petition which is attached to this opinion does not allege that the duties sued for were paid under protest.

The only question, therefore, which need be considered is, whether over-paid duties, paid without protest, can be recovered back by a suit in this court?

That question ought, in my opinion, to be decided in the negative.

The opinion on this subject, delivered by me a few days ago, in *Starges and others vs. the United States*, is annexed to this opinion, and is to be considered a part of it.

The act of Congress of 1845, referred to in that opinion, after saying that nothing contained in the second section of the act of the 3d

of March, 1839, "shall take away, or be construed to take away or impair the right of any person or persons who have paid or shall hereafter pay money, as and for duties under protest, to any collector," &c., concludes as follows: "Nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." (5 Stat. at Large, 727.) In the opinion in *Sturges and others vs. the United States*, I stated that I considered that act of 1845 to be as applicable to a suit in this court, against the government for over-paid duties, as it is to a suit for that cause in any other court against the collector. When that opinion was delivered, I was not aware that the principle just alluded to had been recognised by any of the courts; yet, as it appeared to me so perfectly clear, I did not hesitate to adopt it. But I have since found that the same doctrine, namely, that a suit against a collector for over-paid duties is, in substance, a suit against the United States, had been expressly decided by the circuit court of the United States for the Maryland district. The following is the language of the court:

"For this suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States. The money is in the treasury, and must be paid from the treasury if the plaintiff recover. And as the United States cannot be sued and made a defendant in a court of justice, without their consent, they have an undoubted right to annex to the privilege of suing them any conditions which they deem proper. And, in the exercise of this power, they have granted this privilege in the form of a suit against the collector, where duties are supposed to be overcharged, upon condition that the claimant, when he pays the money, shall give a written notice that he regards the demand as illegal, and means to contest the right of the United States in a court of justice; and stating also, at the same time, distinctly, the specific grounds upon which he objects. This is the condition upon which he is permitted to sue the collector, and thus to appeal from the administrative to the judicial department of the government. It is a condition precedent." (*Mason and Tullis vs. Kane*, MSS.)

That opinion was delivered by Chief Justice Taney, and decides that a suit against the collector for over-paid duties is, in truth and substantially, a suit against the United States. And it also decides that such a suit cannot be sustained if the duties were paid without protest.

If that decision is correct, as it undoubtedly is, it shows conclusively that the suit now before this court, which is a suit against the United States for over-paid duties, paid without protest, is forbidden by the act of 1845, and, of course, cannot be sustained.

The claimant's main argument is, that his testator's money has been unlawfully obtained by the government, and that he has therefore a right to recover it back. The fallacy of that argument consists in assuming what is not true, namely, the unlawfulness of the collection of the money. The truth is, that the money having been paid with-

out protest, was lawfully received by the collector and by the government.

Congress, as a matter of policy, enacted the aforesaid act of 1845; and the Supreme Court of the United States have decided, as they were bound to decide, that, according to that act, duties paid without protest are not illegally exacted. (*Lawrence vs. Caawell*, 13 Howard, 496.) The Court of Claims, like every other court, is bound by the law; and as the act of 1845 has forbidden any suit to be brought against the collector (which, it is decided, would be in truth a suit against the United States) for duties paid without protest, this court cannot, whilst that act is in force, sustain a suit against the government for duties so paid.

The act of 1845 fixes a reasonable time within which objections to the duties charged may be made, and says that if the objections are not made within the time, the duties shall not be recovered back. The object of that act is to secure prompt and final settlements relative to the duties, whilst the facts can be easily ascertained, and to prevent the continual disputes and frauds which would be occasioned by delay. The act appears to be founded on sound policy; but whether it is so or not is a question for the consideration, not of the courts, but of the legislature.

I am of opinion, for the above reasons, that this suit for over-paid duties, paid without protest, cannot be sustained.

ESTATE OF JAMES BEATTY, EXECUTOR.—ON CLAIM FOR DUTIES ILLEGALLY EXACTED ON CRUDE SALTPETRE.

Deposition of John E. Toole.

The deposition of John E. Toole, taken at the request of George J. Beatty, executor of the estate of James Beatty, on the 28th day of March, A. D. 1856, to be used in the investigation of the claim against the United States, now pending in the court of claims, in the name of the estate of James Beatty, executor. The adverse party was notified, did not attend, and did not object.

1st Int. State your name, occupation, age, and place of residence for the past year, and whether you have any interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, you are related to the claimants.

Answer. To the first interrogatory he says: My name is John E. Toole, auditing clerk of the Baltimore custom-house. I am thirty-two years of age, and have resided in Baltimore, in the State of Maryland, during the past year. I have no interest, either direct or indirect, in the claim which is the subject of inquiry. I am not, in any degree, related to the claimant. I appear in reply to the summon; addressed to the collector of the port of Baltimore, as his substitute.

2d Int. Do you know George J. Beatty, and did you know the late James Beatty?

Answer. To the second interrogatory he says: I do not know George J. Beatty: I did know the late James Beatty.

3d Int. Do you know whether James Beatty imported saltpetre into the port of Baltimore, in the year 1844 or 1845, by the barque Active, or by any other vessel? If yea, by what vessel, and at what time?

Answer. To the third interrogatory he says: I have some recollection of Mr. Beatty having imported saltpetre about the year eighteen hundred and forty-five (1845). I know nothing further in answer to this interrogatory, except as appears by the records of the custom-house.

4th. Int. Have you in your possession, or before you, the original invoices and entries of saltpetre imported by James Beatty, in the years 1844 and 1845? If yea, produce the same, or true copies thereof, and state from each entry before you the name of the vessel, the date of the entry, the quantity in pounds described in the entry, the amount of duty paid on the same, by whom and to whom the said duty was paid, and when the same was paid; and, if you know, state whether the duty exacted and paid on the saltpetre specified in such entry was accounted for in the accounts of the customs, and paid over to the treasury of the United States.

Answer. To the fourth interrogatory he says: I have before me an original entry of saltpetre imported in the year eighteen hundred and forty-five (1845) by James Beatty. I am acquainted with the handwriting of James Beatty. This entry was signed by James Beatty, and is of record in the collector's office. This entry is for saltpetre and other goods imported from Calcutta, by the barque Active, and is dated the sixteenth (16th) day of January, eighteen hundred and forty-five (1845). The quantity in pounds is not stated in the entry. The ascertained weight of the saltpetre described in the entry was six hundred and nineteen thousand four hundred and ten pounds (619,410). The amount of duty paid on the same was fifteen hundred and forty-eight dollars and fifty-two cents (\$1,548 52), paid by James Beatty to William H. Marriott, collector, in part on the sixteenth (16th) day of January, eighteen hundred and forty-five (1845), at the time of the entry, and the balance on the completion of the adjustment of the entry, within about a month of the above date. From my knowledge of the business of the custom-house, I can state that the duty paid on the saltpetre specified in said entry was accounted for in the accounts of the customs, and paid over to the treasury of the United States.

5th Int. What class or description of saltpetre was the article imported by James Beatty, and specified in the entry before you? How many classes of saltpetre are there commercially known among importers and dealers in saltpetre, and by what designations are such descriptions of saltpetre commercially known?

Answer. To the fifth interrogatory he says: I state, from the entry before me, that James Beatty entered and described two thousand one hundred and ninety-seven (2,197) bags as "partially refined saltpetre," and one thousand bags as "crude saltpetre." I am unable to state anything further in answer to this interrogatory.

6th Int. Have there been duties refunded to James Beatty on saltpetre? If yea, state when the same were refunded, and the circumstances under which the same were refunded.

Answer. To the sixth interrogatory he says: I have no knowledge that any duties have been refunded to James Beatty on saltpetre, but that on the fifteenth day of April, eighteen hundred and forty-seven (1847), six hundred and forty dollars and eighty-seven cents (\$640 87), with thirty-five dollars (\$35) costs, were paid to John Glenn, attorney of James Beatty, being the amount of the damages, with the costs assessed, in the suit of James Beatty against William H. Marriott, the collector, as appears by the records in the collector's office, which I believed to have been refunded upon the saltpetre in the above-mentioned entry.

Lastly, he says: I do not know of any other matter relative to the claim in question, or relative to the importation of saltpetre referred in my previous answers.

The examination-in-chief of John E. Toole upon the direct interrogatories filed by the petitioner was here concluded, and the examination of the said witness upon the cross interrogatories filed by the United States solicitor was then proceeded with.

1st Cross Int. Were you in the year 1845, or in the preceding years of 1842, 1843, 1844, or either of them, a dealer in saltpetre, either as an importer or purchaser of the article?

Answer. To the first cross interrogatory he says: In the years 1842, 1843, 1844, and 1845, I was employed as a clerk in the office of the collector of customs at Baltimore. I was not a dealer in saltpetre.

2d Cross Int. Do you not know that within either of those years there was in the market, either at Baltimore or elsewhere, a description of saltpetre imported from abroad and known under the designation of "partially refined saltpetre," or by any other designation other than refined or crude saltpetre?

Answer. To the second cross interrogatory he says: I am unable to answer from any personal knowledge.

3d Cross Int. Did you see and examine the saltpetre now in question, imported by Mr. Beatty, a portion of which was entered as crude, and another portion as partially refined? and if so, were they, or were they not, two different descriptions of saltpetre, bearing different prices or values?

Answer. To the third cross interrogatory he says: I did not see and examine the saltpetre in question.

4th Cross Int. If an importer of the article saltpetre in the year 1845, or in the preceding years of 1842, 1843, 1844, would you have sold the article "partially refined saltpetre" at the same price as crude saltpetre, the foreign price of the former being higher than the latter; or would you, if a purchaser, have given the same price for crude as partially refined saltpetre, the market value of the former being lower than that of the latter?

Answer. To the fourth cross interrogatory he says: I cannot answer of my own knowledge.

5th Cross Int. Would you or would you not, as a merchant or dealer, in speaking of the importation or sale or purchase of such articles as

those appearing on the entry of Mr. Beatty as "crude" and "partially refined" saltpetre, bearing distinct and different prices or values, have referred to them by their distinct appellations and as distinct and different articles?

Answer. To the fifth cross interrogatory he says: I am not a merchant, and therefore cannot answer.

There being no further cross interrogatory to propound to the witness, and his testimony being concluded, he was asked "to state whether he knew of any other matter relative to the claim in question; and if so, to state it."

Answer. He answering, says: I know nothing more relative to said claim.

JOHN E. TOOLE.

STATE OF MARYLAND, }
City of Baltimore, } ss.

On this twenty-eighth day of March, A. D. one thousand eight hundred and fifty-six, personally came John E. Toole, the witness within named, and after having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of John E. Toole, taken at the request of George J. Beatty, executor of the estate of James Beatty, to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of the estate of James Beatty, executor. The adverse party was notified, did not attend, and did not object.

GEORGE R. H. HUGHES,
Commissioner.

Fees of witness, —; attendance one day, \$1 50; travel, —; commissioner's fees, \$14 92.

Deposition of Granville S. Oldfield.

The deposition of Granville S. Oldfield, taken at the request of George J. Beatty, executor of the estate of James Beatty, on the twenty-ninth day of March, anno Domini eighteen hundred and fifty-six, (1856,) to be used in the investigation of the claim against the United States, now pending in the Court of Claims in the name of the estate of James Beatty, executor.

The adverse party was notified, did not attend, and did not object.

1st Int. State your name, occupation, age, and place of residence for the past year, and whether you have any interest direct or indirect in the claim which is the subject of inquiry; and whether and in what degree you are related to the claimants?

Answer. To the first interrogatory he says: My name is Granville S. Oldfield, merchant, aged sixty-one years and upwards. My place of residence for the past year has been Baltimore. I have no interest in the claim which is the subject of inquiry. I am not related to the claimant.

2d Int. Do you know George J. Beatty, and did you know the late James Beatty?

Answer. To the second interrogatory he says: I know George J. Beatty, and I knew the late James Beatty.

3d Int. Do you know whether James Beatty imported saltpetre into the port of Baltimore in the year 1844 or 1845 by the barque Active, or by any other vessel? if yea, by what vessel and at what time?

Answer. To the third interrogatory he says: I understood that Mr. Beatty imported saltpetre in the year eighteen hundred and forty-four (1844) or eighteen hundred and forty-five (1845.) I do not know by what vessel.

4th Int. Have you in your possession or before you the original invoices and entries of saltpetre imported by James Beatty in the years 1844 and 1845? if yea, produce the same or true copies thereof, and state from each entry before you the name of the vessel; the date of the entry; the quantity in pounds described in the entry; the amount of duty paid on the same; by whom and to whom the said duty was paid, and when the same was paid; and if you know, state whether the duty exacted and paid on the saltpetre specified in such entry was accounted for in the accounts of the customs and paid over to the treasury of the United States?

Answer. To the fourth interrogatory he says: I know nothing of the matters inquired of in this interrogatory.

5th Int. What class or description of saltpetre was the article imported by James Beatty and specified in the entry before you? How many classes of saltpetre are there commercially known among importers and dealers in saltpetre, and by what designations are such descriptions of saltpetre commercially known?

Answer. To the fifth interrogatory he says: The entry inquired about is not before me. There are two classes of saltpetre commercially known among merchants, importers of and dealers in saltpetre, to wit: crude saltpetre and refined saltpetre.

6th Int. Have there been duties refunded to James Beatty on saltpetre? if yea, state when the same were refunded, and the circumstances under which the same were refunded.

To the sixth interrogatory he says: I know nothing of the matters inquired of in this interrogatory.

Lastly. State whether you know of any other matter relative to the claim in question, or relative to the importation of saltpetre referred to in your answers to the previous interrogatories.

Answer. To this interrogatory he says: Some ten or eleven years since I was called upon to examine a quantity of saltpetre in bags, then in the warehouse of James Beatty, which saltpetre I then understood had been recently imported by him. I examined the entire quantity by taking samples from the bags, and I found it was all

crude saltpetre, and of that class of saltpetre so known among merchants and dealers. I recollect signing a certificate of said examination of the saltpetre for Mr. Beatty, and suppose it was obtained by him to be used at the custom-house.

The examination-in-chief of Granville S. Oldfield upon the direct interrogatories filed by the petitioner was here concluded, and the examination of the said witness upon the cross interrogatories filed by the United States solicitor was then proceeded with.

1st Cross Int. Were you in the year 1845, or in the preceding years of 1842, 1843, 1844, or either of them, a dealer in saltpetre, either as an importer or purchaser of the article?

Answer. To the first cross interrogatory he says: I was not an importer or purchaser of saltpetre in either of the years eighteen hundred and forty-two (1842,) eighteen hundred and forty-three (1843,) eighteen hundred and forty-four (1844,) or eighteen hundred and forty-five (1845.) Previous to that time I imported saltpetre from London, and was a dealer in that article.

2d Cross Int. Do you know that within either of those years, there was in the market, either at Baltimore or elsewhere, a description of saltpetre imported from abroad, and known under the designation of "partially refined saltpetre," or by any other designation than refined or crude saltpetre?

Answer. To the second cross interrogatory he says: I do not know that during any of those years, or subsequently, either in the market of Baltimore, or elsewhere, that there was a description of saltpetre imported and known as "partially refined saltpetre." All the saltpetre of commerce is commercially known either as "refined saltpetre, or crude saltpetre."

3d. Cross Int. Did you see and examine the saltpetre now in question, imported by Mr. Beatty, a portion of which was entered as "crude," and another portion as "partially refined?" and if so, were they, or were they not, two different descriptions of saltpetre, bearing different prices or values?

Answer. To the third cross interrogatory he says: I examined, as I have before stated, the saltpetre in Mr. Beatty's warehouse, which I supposed to be the saltpetre inquired about. I do not know how it was entered by Mr. Beatty. That which I examined was all of one description, to wit: crude saltpetre.

4th Cross Int. If an importer of the article saltpetre in the year 1845, or in the preceding years of 1842, 1843, 1844, would you have sold the article "partially refined" saltpetre at the same price as "crude" saltpetre, the foreign price of the former being higher than the latter; or would you, if a purchaser, have given the same price for crude as for partially refined saltpetre, the market value of the former being lower than that of the latter?

Answer. To the fourth cross interrogatory he says: I do not know anything about "partially refined saltpetre," and never saw any.

5th Cross Int. Would you, or would you not, as a merchant or dealer, in speaking of the importation, or sale, or purchase of such articles as those appearing on the entry of Mr. Beatty as "crude" and "partially refined saltpetre," bearing distinct and different prices or

values, have referred to them by their distinct appellations, and as distinct and different articles?

Answer. To the fifth cross interrogatory he says: The entry of Mr. Beatty is not before me. I do not know what it states. I know nothing further of the matters inquired of in this interrogatory.

There being no further cross interrogatory to propound to the witness, and his testimony being concluded, he was asked "to state whether he knew of any other matter relative to the claim in question; and if so, to state it."

Answer. He answering, says: I know nothing more relative to said claim.

G. S. OLDFIELD.

STATE OF MARYLAND, }
City of Baltimore, } ss.

On this twenty-ninth day of March, A. D. eighteen hundred and fifty-six, personally came Granville S. Oldfield, the witness within named, and after having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner, in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of Granville S. Oldfield, taken at the request of George J. Beatty, executor of the estate of James Beatty, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of the estate of James Beatty, executor. The adverse party was notified, did not attend, and did not object.

GEORGE R. H. HUGHES,
Commissioner.

Fees of witness, \$——; attendance one day, \$1 50; travel, \$——; commissioner's fees, \$14 31.

Deposition of Charles R. Pearce.

The deposition of Charles R. Pearce, taken at the request of George J. Beatty, executor of the estate of James Beatty, on the twenty-ninth (29th) day of March, A. D. eighteen hundred and fifty-six, (1856,) to be used in the investigation of the claim against the United States, now pending in the Court of Claims, in the name of the estate of James Beatty, executor. The adverse party was notified, did not attend, and did not object.

1st Int. State your name, occupation, age, and place of residence for the past year, and whether you have any interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, you are related to the claimants?

Answer. To the first interrogatory he says: My name is Charles R. Pearce, merchant, aged fifty years and upwards. I have resided in Baltimore during the past year. I have no interest in the claim which is the subject of inquiry. I am not in any degree related to the claimant.

2d Int. Do you know George J. Beatty, and did you know the late James Beatty?

Answer. I did know the late James Beatty. I know his son, but do not know his first name.

3d Int. Do you know whether James Beatty imported saltpetre into the port of Baltimore, in the year 1844 or 1845, by the barque Active, or by any other vessel? If yea, by what vessel, and at what time?

Answer. To the third interrogatory he says: I know nothing of the matters inquired of in this interrogatory.

4th Int. Have you in your possession, or before you, the original invoices and entries of the saltpetre imported by James Beatty, in the years 1844 and 1845? If yea, produce the same, or true copies thereof; and state from each entry before you the name of the vessel, the date of the entry, the quantity, in pounds, described in the entry, the amount of duty paid on the same, by whom and to whom the said duty was paid, and when the same was paid; and if you know, state whether the duty exacted and paid on the saltpetre specified in such entry was accounted for in the accounts of the customs, and paid over to the treasury of the United States?

Answer. To the fourth interrogatory he says: I know nothing of the matters inquired of in this interrogatory.

5th Int. What class or description of saltpetre was the article imported by James Beatty, and specified in the entry before you? How many classes of saltpetre are there commercially known among importers and dealers in saltpetre, and by what designations are such descriptions of saltpetre commercially known?

Answer. To the fifth interrogatory he says: The entry inquired about is not before me. There are two classes of saltpetre commercially known among merchants, importers, and dealers in saltpetre, to wit: crude saltpetre and refined saltpetre.

6th Int. Have there been duties refunded to James Beatty on saltpetre? If yea, state when the same were refunded, and the circumstances under which the same were refunded.

Answer. To the sixth interrogatory he says: I know nothing of the matters inquired of in this interrogatory.

Lastly. State whether you know of any other matter relative to the claim in question, or relative to the importation of saltpetre referred to in your answers to the previous interrogatories?

Lastly. To this interrogatory he says: I was once called upon to state to the public appraisers of the customs my opinion in reference to some saltpetre imported by James Beatty, and, to the best of my recollection, I stated that the saltpetre imported from Calcutta was crude saltpetre, and that I have not known of any refined or partially refined saltpetre imported from Calcutta.

The examination-in-chief of Charles R. Pearce, upon the direct interrogatories filed by the petitioner, was here concluded, and the ex-

amination of the said witness upon the cross-interrogatories filed by the United States was then proceeded with.

1st Cross Int. Were you in the year 1845, or in the preceding years of 1842, 1843, 1844, or either of them, a dealer in saltpetre, either as an importer or purchaser of the article?

Answer. To the first cross interrogatory he says: I was not an importer of or purchaser of saltpetre in the years eighteen hundred and forty-two, (1842) eighteen hundred and forty-three, (1843) eighteen hundred and forty-four, (1844) or eighteen hundred and forty-five, (1845) as I at present recollect. During the last-mentioned years I was a member of the firm of Birkhead & Pearce, of Baltimore, which firm had frequently in those years saltpetre consigned to them for sale on commission.

2d Cross Int. Do you know that within either of those years there was in the market, either at Baltimore or elsewhere, a description of saltpetre imported from abroad, and known under the designation of "partially refined saltpetre," or by any other designation than refined or crude saltpetre?

Answer. To the second cross interrogatory he says: I do not know that during any of those years, or subsequently, either in the market of Baltimore or elsewhere, there was a description of saltpetre imported and known as "partially refined saltpetre." All the saltpetre of commerce is commercially known either as "refined saltpetre or crude saltpetre."

3d Cross Int. Did you see and examine the saltpetre now in question, imported by Mr. Beatty, a portion of which was entered as crude, and another portion as partially refined? and if so, were they or were they not two different descriptions of saltpetre, bearing different prices or values?

Answer. To the third cross interrogatory he says: I saw and examined some samples of saltpetre, which I supposed was imported by James Beatty, and which was crude saltpetre. I know nothing further of the matters inquired of in this interrogatory.

4th Cross Int. If an importer of the article saltpetre in the year 1845, or in the preceding years of 1842, 1843, 1844, would you have sold the article "partially refined saltpetre" at the same price as crude saltpetre, the foreign price of the former being higher than the latter; or would you, if a purchaser, have given the same price for crude as for partially refined saltpetre, the market value of the former being lower than that of the latter?

Answer. To the fourth cross interrogatory he says: I know of no article as partially refined saltpetre. There are various qualities of crude saltpetre, some having more impurities than others, which circumstance affects their price or value.

5th Cross Int. Would you or would you not, as a merchant or dealer, in speaking of the importation or sale or purchase of such articles as those appearing on the entry of Mr. Beatty as "crude" and "partially refined" saltpetre, bearing distinct and different prices or values, have referred to them by their distinct appellations and as distinct and different articles?

Answer. To the fifth cross interrogatory he says: I cannot state what is upon the entry of Mr. Beatty referred to in this interrogatory.

There being no further cross interrogatory to propound to the witness, and his testimony being concluded, he was asked "to state whether he knew of any other matter relative to the claim in question; and-if so, to state it."

Answer. He answering, says: I know nothing more relative to said claim.

C. R. PEARCE.

STATE OF MARYLAND, }
City of Baltimore, } ss.

On this twenty-ninth day of March, anno Domini eighteen hundred and fifty-six, personally came Charles R. Pearce, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written pown by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Charles R. Pearce, taken at the request of George J. Beatty, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of the estate of James Beatty, executor.

The adverse party was notified, did not attend, and did not object.

GEORGE R. H. HUGHES,
Commissioner.

Fees of witness, —; attendance one day, \$1 50; travel, —; commissioner's fees, \$9.

Deposition of Henry Thomas.

The deposition of Henry Thomas, taken at the request of George J. Beatty, executor of the estate of James Beatty, on the thirty-first (31st) day of March, eighteen hundred and fifty-six, (1856,) to be used in the investigation of a claim against the United States, now pending in the Court of Claims in the name of the estate of James Beatty, executor.

The adverse party was notified, did not attend, and did not object.

1st Int. State your name, occupation, age, and place of residence for the past year, and whether you have any interest direct or indirect in the claim which is the subject of inquiry; and whether and in what degree you are related to the claimant?

Answer. To the first interrogatory he says: My name is Henry Thomas, porter, aged fifty-six years and upwards. My place of residence for the past year has been in Baltimore. I have no interest in the claim which is the subject of inquiry. I am not in any degree

related with the claimant. I was in the employ of James Beatty from about the year 1839 until his death, which was in the year eighteen hundred and fifty-one, (1851,) or eighteen hundred and fifty-two, (1852.)

2d. Int. Do you know George J. Beatty, and did you know the late James Beatty?

Answer. To the second interrogatory he says: I know George J. Beatty, and I knew the late James Beatty.

3d Int. Do you know whether James Beatty imported saltpetre into the port of Baltimore in the year 1844 or 1845 by the barque Active, or by any other vessel? if yea, by what vessel and at what time?

Answer. To the third interrogatory he says: I know that James Beatty imported saltpetre into the port of Baltimore in either the year eighteen hundred and forty-four (1844) or eighteen hundred and forty-five (1845.) Witness cannot now recollect in which of those years, but is certain it was in one of them, by the barque Active.

4th Int. Have you in your possession or before you the original invoices and entries of saltpetre imported by James Beatty in the years 1844 and 1845? if yea, produce the same or true copies thereof, and state from each entry before you the name of the vessel; the date of the entry; the quantity in pounds described in the entry; the amount of duty paid on the same; by whom and to whom the said duty was paid, and when the same was paid; and if you know, state whether the duty exacted and paid on the saltpetre specified in such entry was accounted for in the accounts of the customs and paid over to the treasury of the United States.

Answer. To the fourth interrogatory he says: I know nothing of the matters inquired of in this interrogatory.

5th Int. What class or description of saltpetre was the article imported by James Beatty, and specified in the entry before you? How many classes of saltpetre are there commercially known among importers and dealers in saltpetre, and by what designations are such descriptions of saltpetre commercially known?

Answer. To the fifth interrogatory he says: The entry inquired of is not before me. I know nothing of the matters inquired of in this interrogatory, further than that I have never known, in my experience, any other classes of saltpetre than crude saltpetre and refined saltpetre.

6th Int. Have there been duties refunded to James Beatty on saltpetre? If yea, state when the same were refunded, and the circumstances under which the same were refunded?

Answer. To the sixth interrogatory he says: I know nothing of the matters inquired of in this interrogatory.

Lastly. State whether you know of any other matter relative to the claim in question, or relative to the importation of saltpetre referred to in your answers to the previous interrogatories?

Lastly. To this interrogatory he says: The saltpetre abovementioned as imported by James Beatty, in the barque Active, about the year eighteen hundred and forty-four (1844) or eighteen hundred and forty-five (1845) was all one description of saltpetre, and was crude saltpetre. I examined and handled the entire importation. I re

lect that the entire quantity of saltpetre, so imported, was examined in my presence by Granville S. Oldfield, of Baltimore, and was found and reported by him to be crude saltpetre. I think, to the best of my recollection, there was some difficulty at the custom-house in reference to the said saltpetre, and that it was in consequence of that difficulty that the said examination of it was made. James Beatty was a manufacturer of powder, and purchased and used crude saltpetre, and only crude saltpetre, for that purpose. I have been well acquainted with the article saltpetre since prior to the year eighteen hundred and forty (1840.) I have never known James Beatty to import or purchase any saltpetre but crude saltpetre.

The examination-in-chief of Henry Thomas, upon the direct interrogatories filed by the claimant, was here concluded, and the examination upon the cross interrogatories, filed by the United States solicitor was then proceeded with.

1st Cross Int. Were you in the year 1845, or in the preceding years of 1842, 1843, 1844, or either of them, a dealer in saltpetre, either as an importer or purchaser of the article?

Answer. To the first cross interrogatory he says: I was not an importer or purchaser of saltpetre in either of the years eighteen hundred and forty-two, (1842,) eighteen hundred and forty-three, (1843,) eighteen hundred and forty-four, (1844,) or eighteen hundred and forty-five (1845.)

2d Cross Int. Do you know that, within either of those years, there was in the market, either at Baltimore or elsewhere, a description of saltpetre imported from abroad and known under the designation of "partially refined saltpetre," or by any other designation than refined or crude saltpetre?

Answer. To the second cross interrogatory he says: I do not know that within either of those years there was in the market, either at Baltimore or elsewhere, a description of saltpetre imported and known as "partially refined saltpetre." I have never known of any other designation of saltpetre than refined saltpetre or crude saltpetre.

3d Cross Int. Did you see and examine the saltpetre now in question, imported by Mr. Beatty, a portion of which was entered as crude, and another portion as partially refined? and if so, were they or were they not two different descriptions of saltpetre, bearing different prices or values?

Answer. To the third cross interrogatory he says: I saw the saltpetre now in question, imported by Mr. Beatty. That which I saw was all of one description, to wit: crude saltpetre.

4th Cross Int. If an importer of the article saltpetre, in the year 1845, or in the preceding years of 1842, 1843, 1844, would you have sold the article partially refined saltpetre at the same price as crude saltpetre, the foreign price of the former being higher than the latter; or would you, if a purchaser, have given the same price for crude as for partially refined saltpetre, the market value of the former being lower than that of the latter?

Answer. To the fourth cross interrogatory he says: I have never known, or seen, to my knowledge, the article partially refined salt-

petre, and cannot, therefore, answer the particulars inquired of in this interrogatory.

5th Cross Int. Would you or would you not, as a merchant or dealer, in speaking of the importation or sale or purchase of such articles as those appearing on the entry of Mr. Beatty as "crude" and "partially refined" saltpetre, bearing distinct and different prices or values, have referred to them by their distinct appellations, and as distinct and different articles?

Answer. To the fifth cross interrogatory he says: I have never known or seen the article "partially refined saltpetre."

There being no further interrogatory to be propounded to Henry Thomas, he was asked to "state whether he knew of any other matter relative to the claim in question; and if so, to state it."

Answer. He answering, said: I know nothing more relative to said claim.

HENRY THOMAS.

STATE OF MARYLAND, }
City of Baltimore, } ss.

On this thirty-first day of March, A. D. eighteen hundred and fifty-six (1856) personally came Henry Thomas, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner, in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of Henry Thomas, taken at the request of George J. Beatty, executor of the estate of James Beatty, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of the estate of James Beatty. The adverse party was notified, did not attend, and did not object.

GEORGE R. H. HUGHES,
Commissioner.

Robert Bines, deputy naval officer, named as a witness in the interrogatories hereto annexed, was inquired of by me in relation to the matters of this claim, and he answering that he knew nothing further than the papers of record in the custom-house set forth, and because the testimony of John E. Toole, who appeared as a substitute of the collector of the customs, and was examined by me touching the matters of record in his office, had been already taken, *his examination* was therefore waived.

GEORGE R. H. HUGHES,
Commissioner.

Fees of witness; —; attendance one day, \$1 50; travel, —; commissioner's fees, \$9 62 .

TREASURY DEPARTMENT,

April 19, 1856.

Pursuant to the act of Congress of 22d February, 1849, I hereby certify that the annexed papers marked 1, 2, and 3, are true copies, from the records and files of this department.

In witness whereof, I have hereunto set my hand, and caused [L. s.] the seal of the Treasury Department to be affixed, on the day and year first above written.

JAMES GUTHRIE,
Secretary of the Treasury.

No. 1.

MAY 5, 1848.

SIR: I find my opinion is asked by the Secretary of the Treasury as to the bearing of the decision of the circuit court in the late case of James Beatty *vs.* yourself, as collector, to recover back certain duties paid under protest, on saltpetre, upon his petition to have refunded to him certain duties paid at the same time, and upon part of the same cargo, but paid voluntarily and without protest. There is no doubt that such a payment would conclude Mr. Beatty from recovering at law, independently of the acts of Congress on the subject and without reference to the peculiar character of the United States, the virtual defendant.

But I presume this is not the aspect in which the Secretary designs to look at the matter of Mr. Beatty's petition. At the time of the decision I transmitted to you a report of the opinion of the Chief Justice, which I had previously submitted to him for correction. I presume that paper is with the Secretary of the Treasury. I send you now the instructions of the judge, the result of his opinion. If the fact be, about which you tell me there can be no doubt, that the saltpetre upon which the duty was paid, as partially refined, and without protest, was of the same class of saltpetre, in the understanding of commercial men, as that upon which the duty was paid under protest, I have no hesitation in saying that, under the decision of the court, had Mr. Beatty protested against the payment of all these duties, he could have recovered back the whole.

Mr. Beatty seems to have been influenced in his course by the different degrees of purity of the article, and judged that a particular amount of alloy created the distinction between partially refined and crude, which authorized the collection of the duty imposed by the tariff law in question. The testimony of commercial men was, that in commerce no distinction was known between saltpetres, founded upon the degrees of their purity, and that in commerce there were but two classes of the article, the "crude," such as was the entire importation of Mr. Beatty without reference to its quantity of impurities, and the "refined," meaning thereby to designate the saltpetre of the shops, such as has been subjected to the action of the chemicals and prepared for medicinal, chemical, culinary and other domestic purposes. I think it will be found, by reference to the opinion of

the court heretofore reported to you, that it denies to Congress the power of creating classes of commercial articles under the use of commercial terms, other than such as are established and familiarly known to commercial men by those terms; consequently, to have created a class of saltpetre, unknown to commerce, under the title of "partially refined saltpetre," it was necessary for Congress to have defined the amount of alloy which should distinguish the "partially refined," from the "crude," and that in the absence of such a definition the term "crude," as applied to saltpetre in the *commercial understanding* of the term, must have its full scope, and must embrace all saltpetre but that of the shops heretofore referred to as the refined saltpetre of commerce. The whole of Mr. Beatty's importation now in question was of course, according to the facts which you state to me as undoubted, "crude" saltpetre in the commercial sense of that term, and none of it was subject to duty under the decision of the court. This is my recollection of the opinion of the court, and my view of its effects upon Mr. Beatty's rights.

Respectfully, your obedient servant,

W. L. MARSHALL, *U. S. Attorney.*

Gen. WM. H. MARRIOTT, *Collector, &c.*

JAMES BEATTY
vs.
WM. H. MARRIOTT. } *April term, 1847—Court's instructions to the jury.*

If the jury find from the evidence in the case that the article in question was at the time of the passage of the act of 1842, and before and ever since, and still is, well known in commerce, in the ports of the United States and elsewhere, as crude saltpetre, it was entitled to be admitted free of duty, and the plaintiff is entitled to recover back the duty paid on it.

True copy :

THOS. SPICER, *Clerk.*

No. 2.

TREASURY DEPARTMENT,
February 1, 1850.

SIR: The certified statement from the office of the collector of Baltimore, under date of the 7th May, 1849, on the claim of Mr. James Beatty, of Baltimore, under the 2d section of the act "to refund to certain persons an excess of duty, &c," approved the 8th of August, 1846, amounting to \$1,087 41, being for duties exacted on saltpetre imported into the port of Baltimore, per barque "Active," January 15th, 1845, is hereby returned for cancellation at your office, it being found, on examination at this department, that the said claim is inadmissible under the laws.

Very respectfully, your obedient servant,

W. M. MEREDITH,
Secretary of the Treasury.

GEORGE P. KANE, Esq.,
Collector of the Customs, Baltimore, Maryland.

No. 3.

UNDER THE 3^d SECTION OF THE ACT OF AUGUST 8, 1848.

Statement of duty claimed to be refunded, as having been illegally exacted on saltpetre imported by James Beatty, of Baltimore city, as per decision of the United States courts, acquiesced in by the Treasury Department.

Date.	Vessel.	Where from.	Marks and numbers.	DESCRIPTION OF GOODS.			Quantity.	Duty paid, at $\frac{1}{2}$ cent per pound.	Rate of duty, as alleged by importer.	Duty illegally exacted, as alleged, & now claimed to be returned.
				Per invoice.	Per entry.	Per appraiser's report.				
1845. Jan. 15	Barque Active.	Calcutta.....	A, 1c4.....	Saltpetre	Partially refund'd saltpetre.	Partially refund'd	Per entry, lbs.. 400,000 Increase by actual weight.. 34,985 Total weight. 434,985	Per entry.. \$1,000 00 Increase, per true wt.. 87 41 As adjust'd 1,087 41	Free, as crude.	\$1,087 41

CUSTOM HOUSE, BALTIMORE, May 7, 1849.

The entry which contains the saltpetre in the above statement under mark A, characterized by the importer, James Beatty, therein, "*partially refined saltpetre*," and estimated by him at a duty of $\frac{1}{4}$ cent per pound, contains, also, 1,000 bags with marks B M and B A M, which he characterized as "*crude*," and entered "*free*." Both of these parcels were in the same invoice, and denominated simply "*saltpetre*;" that which Mr. Beatty, himself, characterized as "*partially refined*," being at a price a fraction higher per pound than that which he called "*crude*," the one ranging from 6-11 to 7-0 6, the other from 6-4 to 6-12. With the exception of this, there is no evidence here of a difference in the character or quality of the two parcels, or why he made the discrimination; whether from actual inspection and comparison, or from better or other cause. The appraisers, however, being of opinion that the thousand bags which was entered as "*crude*" was "*partially refined*," and having caused it to be analyzed by Mr. Stewart, a chemist, whose analysis sustained their opinion, reported to the collector that, in their opinion, "all the saltpetre imported by James Beatty, esq.," in the barque "*Active*," from Calcutta, is "*partially refined*." On this report, the collector caused the duty to be levied on the 1,000 bags, which amounted to \$461 11. That portion of the saltpetre in the above statement being entered by Mr. Beatty as *partially refined*, was not analyzed by Mr. Stewart. Mr. Beatty paid the duty specified in the above statement, to wit, \$1,087 41, without objection, but refused to pay that which was levied on the 1,000 bags, alleging that it was *crude* and entitled to entry "*free*," and the collector withheld it. A few days afterwards, however, having use for it—to wit, on the 27th of January—he made a second entry and paid the duty under protest, amounting to \$461 11. He afterwards brought suit against the collector to recover back this money, obtained judgment, and was paid the same on the 21st of April, 1847.

The above sum of one thousand and eighty-seven dollars and forty-one cents was paid over to the United States. It does not appear, after diligent search and careful examination of the files and records of this custom-house, that the said sum, or any part thereof, has been heretofore refunded, or that James Beatty is indebted in arrears to the United States.

W. H. MARRIOTT,
Collector.

JAMES POLK, *Naval Officer.*

I, James Beatty, do hereby declare, on oath, that I am not indebted in arrears to the United States, and that my claim for the refundment for the duty collected in excess, as appears by the above statement, has not been alienated by assignment or by operation of law, but forms part of my effects, and that no portion of the same has been refunded to me.

JAMES BEATTY.

W. H. MARRIOTT, *Collector.*
MAY 8, 1849.

COURT OF CLAIMS.

Estate of JAMES BEATTY, executor's }
 claim for duties illegally exacted } *Petitioner's demand, proved by*
 on crude saltpetre. } *certified statement of collector.*

The petitioner asks for judgment for duties exacted, by mistake of fact, on a free article, saltpetre.

The facts on which we claim to recover are set forth in the petition, and established by the depositions taken in answer to the interrogatories; also established, in a summary manner, by the certified statements furnished by the Treasury Department. See the statement signed by the collector and the naval officer; also, the statement signed by Wm. L. Marshal, United States district attorney.

The amount we claim is set forth in the certified statement of the collector to be \$1,087 41

We also ask for interest on that amount at 6 per cent. from the time of payment, January, 1845, to 27th May, 1856,
 10 years $3\frac{7}{10}$ 673 90

1,761 31

For printing petition and brief..... \$10 00

For commissioner's fees, for taking depositions
 used in evidence..... 53 85

For counsel fees, preparing petition, interroga-
 tories, and taking depositions..... 50 00

113 85

Total claimed..... 1,875 16

JAMES BEATTY'S EXECUTOR vs. THE UNITED STATES.

Scarburgh, J., delivered the opinion of the court.

It is conceded by the solicitor, and the court find, that the allegations of the petition filed in this case are established by the evidence. It is also conceded by the solicitor, that, the money now sought to be reclaimed having been paid under a mistake of *fact*, the importer being under the mistaken impression, at the time of the payment, that the saltpetre on which the duty was paid was "partially refined saltpetre," when in fact it was "crude saltpetre," there being no such thing known in commerce as "partially refined saltpetre," the petitioner is entitled to relief. In the opinion heretofore delivered by this court, we came to the conclusion, that if the allegations of the petition should be sustained by the evidence, the petitioner's right to relief would be unquestionable. They are fully sustained, and we shall report to Congress a bill in favor of the petitioner for one thousand and eighty-seven dollars and forty-one cents.

The reasons for this opinion will be found in the opinion heretofore delivered by this court in this case, in the opinion of this court in the case of Henry and Frederick W. Meyer vs. The United States, and in the opinions thereto appended.

BEATTY'S EXECUTOR *vs.* THE UNITED STATES.

Judge Blackford's dissenting opinion :

Suit for overpaid duties.

I dissent from the final judgment rendered in this case by a majority of the court in favor of the claimant.

The ground of my dissent is, that the duties sued for were paid without any objection, either written or verbal. The payment was therefore voluntary, and cannot be recovered back. That doctrine is settled by the common law, and by the act of Congress of 1845. Indeed, the act of Congress requires a written protest, stating distinctly and specifically the grounds of objection to the payment. 5 Stat. at Large, 727 ; see *Marriott vs. Brune*, 9 Howard, 619, 636 ; *Lawrence vs. Caswell*, 13 Howard, 488, 496.

The reasons of my dissent are given at length in the opinion heretofore delivered by me, in this case, on the question as to the validity of the petition ; which opinion is hereto appended, and made part of this opinion.

The dissenting opinions heretofore delivered by me in the cases of *Sturges, Bennet & Co. vs. The United States*, *Spence and Reid vs. The United States*, and *Wood vs. The United States*, are also hereto appended, as a part of this opinion.

STURGES, BENNET & Co. *vs.* THE UNITED STATES.

The dissenting opinion was delivered by Judge Blackford.

I am obliged to dissent from the judgment of the court in this case.

The petition attached to this opinion shows the grounds of the claim. The duties sued for were collected during the years 1847, 1848, 1849, 1850, and 1851.

The petition, in my opinion, is defective, because it does not allege that any of the duties were paid *under protest*. The act of Congress of 1845, chapter 22, prohibits any suit against a collector for overpaid duties, if the payment was made without protest. That point is expressly decided by the circuit court of the United States for the Maryland district, at the April term 1849, in *Brune vs. Marriott*. In that case the protest was not made until *after* some of the duties were paid, and the decision was, that for such of the duties there could be no recovery. The language of the court is as follows : " The remaining question is, what duties were paid under protest, within the meaning of the act of 1845 ? That act requires that the protest shall be made in writing, signed by the claimant, at or before the payment of the duties, and set forth, distinctly and specifically, the grounds of objection. The protest of April 9, 1847, cannot apply to the payments previously made, and the plaintiff is not entitled to recover them. But it is sufficient to cover all subsequent payments," &c.

If there has been a protest, the suit is allowed, as the statute ex-

pressly says, in order "to ascertain and try the legality and validity of such demand and payment of duties." I consider that statute to be as applicable to a suit in this court, against the government for overpaid duties, as it is to a suit for that cause, in any other court, against the collector. The object of both suits is the same, namely, to ascertain and try the legality and validity of the demand and payment of duties alleged to have been overpaid. If such demand and payment of duties were legal and valid, the importer cannot, in a court professing to be governed by legal principles, recover those duties, either from the collector or from the government. That appears to me to be a clear proposition. Congress has thought proper, by the law of 1845, to prescribe a certain rule for the collector and importer relative to the collection of duties; and whilst the law is in force, that rule must be complied with. The rule is, that if the importer wishes to object to the amount of duty charged, the objection must be made at or before the payment of the duty. If no objection be made within the time limited by law, the demand and payment of the duty must be considered legal and valid.

It will be observed that the statute of 1845, which prohibits any suit for overpaid duties, unless there has been a sufficient protest, applies to duties of every description, without exception. 5 Stat. at Large, 727. The effect of this statute relative to the protest is clearly stated in an opinion delivered by Chief Justice Taney in 1849. His language is as follows: "The protest is not required to be made on or before the payment of what are called the estimated duties. For this payment is necessarily regulated by the invoice quantity, as well as the invoice price. The importer cannot, at that time, know whether there has been any loss by leakage; nor can he know, after it has been ascertained by the weigher and gauger, whether the collector will exact duties upon the amount stated in the invoice.

"The payment is legally made when the duties are finally determined, and the amount assessed by the collector; and a protest before or at that time is sufficient notice, as it warns the collector, before he renders his account to the Treasury Department, that he will be held personally responsible if the portion disputed is not legally due, and that the claimant means to assert his right in a court of justice.

"The payment of the money upon the estimated duties is rather in the nature of a pledge or deposit than a payment. For it remains in the hands of the proper officer, subject to the final assessment of the duties; and if more has been paid than is due, (which is most commonly the case,) the overplus belongs to the importer, and is returned to him." *Brune vs. Marriott*, before cited. The Supreme Court affirmed that judgment, using, as to the protest, the following language: "But where the duties had not been closed up in any cases when the written protest in April was filed, though the preliminary payment of the estimated duties had taken place, the court justly considered the protest valid; because, till the final adjustment, the money remains in the hands of the collector, and is not accounted for with the government, and more may be necessary to be paid by the importer." *Marriott vs. Brune*, 9 How., 619, 636.

The law is, therefore, settled, that under the aforesaid statute of Rep. C. C. 36—4

1845, the importer is not required to make his protest until after the weigher or gauger has made his return, and the importer has had a full opportunity to know what that return is, and for what sum he is legally chargeable. That being the law, it is clear that there can be no hardship or injustice in requiring the protest. But, on the other hand, if at any distance of time after duties have been paid without objection, and with a full opportunity of knowing the facts, the United States are to be subject to be called upon for alleged overpaid duties, there will be no end to the evils that will ensue.

The language of the Supreme Court of the United States in 1851, with respect to the question now under consideration, is as follows: "But it is proper to say, in order that the opinion of the court may not be misunderstood, that when we speak of duties illegally exacted, the court mean to confine the opinion to cases like the present, in which the duty demanded was paid under protest, stating specially the ground of objection. Where no such protest is made, the duties are not illegally exacted, in the legal sense of the term; for the law has confided to the Secretary of the Treasury the power of deciding, in the first instance, upon the amount of duties due on the importation. And if the party acquiesces, and does not, by his protest, appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal to which the law has confided the power of deciding the question.

"Money is often paid under the decision of an inferior court, without appeal, upon the construction of a law which is afterwards, in some other case, in a higher and superior court, determined to have been an erroneous construction; but money thus paid is not illegally exacted. Nor are duties illegally exacted where they are paid under the decision of the collector, sanctioned by the Secretary of the Treasury, and without appealing from that decision to the judicial tribunals by a proper and legal protest. Nor are they within the principle decided in the case before us." *Lawrence vs. Caswell*, 13 Howard, 488, 496. That is the unanimous opinion of the highest judicial tribunal in the United States on the precise question now before us. It is the opinion of that court on the meaning of the act of Congress of 1845, before referred to. That opinion is, that duties paid *without protest*, as the duties in the case before us were paid, are not illegally exacted; and, surely, if the duties now sued for were not illegally exacted—that is, if the collection of those duties was lawful, the claimants can have no right, in a court of justice, to recover them back, either from the collector or from the government.

My opinion is, therefore, that the petition shows no ground for relief.

SPENCE & REID, CONSIGNEE AGENTS OF MASON & TULLIS, vs. THE UNITED STATES.

[The petition of the claimants is hereto attached.]

Dissenting opinion delivered by Judge Blackford.

I dissent from that part of the judgment in this case which sustains the present suit as to certain overcharged duties.

The duties in question were paid to the collector without a written protest setting forth the grounds of objection, and were afterwards paid by the collector into the treasury of the United States.

The decision of the court is, that duties paid without such protest may be recovered back by a suit in this court. That decision is, in my opinion, contrary to the act of Congress of 1845, chapter 22.

The dissenting opinions delivered by me in the cases of *Sturges, Bennet & Co. vs. The United States*, and of *Beatty vs. The United States*, are hereto attached and made part of this opinion.

Mason & Tullis, for whose use this suit is brought, sued the collector in Baltimore for overcharged duties on the same pimento mentioned in the present petition. The circuit court of the United States decided, in that case, that the suit was, in substance, a suit against the United States, and that "*the money was in the treasury, and must be paid from the treasury if the plaintiff recover.*" They also decided that the suit would not lie, because there was no legal protest. (*Mason & Tullis vs. Kane*, circuit court of the United States for the Maryland district, April term, 1851.) That decision is in direct opposition to the present decision of this court in substantially the same case. The consequence of the judgment in this case is as follows: A merchant sues the collector in a circuit court of the United States for overcharged duties. The effect of the suit, if successful, is to obtain from the treasury of the United States the amount of those duties. But the suit fails for *the want of a legal protest*. The same merchant then turns round and sues the United States, in the Court of Claims, for the same duties, and recovers *without such protest*. One court decides that the treasury of the United States is liable upon the same state of facts on which the other decides that the treasury is not liable. It is impossible that these contradictory decisions can both be right.

The act of 1845 prescribes the condition upon the performance of which, and only upon such performance, a suit will lie for overpaid duties. That condition is, the making of a legal protest within the proper time. The policy of the act is very clear. It is noticed by Chief Justice Taney, in the following words: "Now the act of February 26, 1845, in express terms, provides, that no action of this kind shall be maintained against a collector, 'unless the said protest was made in writing, and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.'

"It is not, therefore, sufficient to object to the payment of any particular duty or amount of duty, and to protest in writing against it. The claimant must do more. He must set forth in his protest the grounds upon which he objects, distinctly and specifically. And these latter words are too emphatic to be regarded as mere surplusage, or to be overlooked in the construction of this law. The object of this provision is obvious. In the multitude of collection offices in the United States, and the changes which so frequently take place in the officers, mistakes and oversights will sometimes take place, and irregularities in the assessment of duties. And the object of this provision is to prevent a party from taking advantage of such objections when it is too late to correct them, and to compel him to disclose the grounds

of his objection at the time when he makes his protest. The case before the court strikingly exemplifies the policy of this provision. One of the objections is, that the merchant appraisers did not actually inspect the pimento. It was not actually looked at and inspected by these appraisers, because there was no controversy about its quality. The consignees had notice and appeared before the merchant appraisers, and did not suggest that there was any defect in the quality which would lower the value, nor express a wish to have it inspected. They offered to prove that it was bought for the price at which it was invoiced, and that such was then the market price at the place where it was purchased. The appraisers were satisfied that it was bought at the price stated, but were of opinion that the price was lower than its market value in the principal markets of the island, and appraised its dutiable value accordingly.

"There is not the slightest reason to suppose that their assessment would have been in any degree influenced or changed by the actual inspection of the article. And if this objection had been stated in the protest, the error could have been immediately corrected before the duties were exacted; but it is now too late. And if this oversight be fatal to this appraisement, and renders it invalid, then the public lose not only the enhanced duties to which the pimento was liable, but also the additional or penal duty, which was the consequence of the merchant appraisal. The same may be said of the other grounds of objection above mentioned. If they had been set forth in the protest as the grounds of objection, and had been deemed tenable by the administrative department, the errors could have been corrected without the expense of litigation, and the duties which (the) law imposes secured to the public. And it is for this purpose that the act of 1845 requires the grounds of objection to be distinctly and specifically set forth in the protest. For this suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States." (Mason & Tullis *vs.* Kane, above cited.)

That opinion shows very clearly that the said act of 1845 is founded in sound policy. But whether it be so or not, no court can repeal it. Whilst it is in force it must be obeyed.

The only argument in the present case made by the claimants that appears to me to require an answer, is, that this suit is not against the collector, but is against the United States. That argument admits of a short and conclusive answer. It is this: The law is settled by said decision of the United States court, that a suit against the collector for overcharged duties is, in truth, a suit against the United States. So that, according to that decision, which is certainly correct, the mere fact that this suit is against the United States, and not against the collector, is no reason that the suit should be sustained.

I must be permitted to repeat here, what was said by me in *Sturges, Bennet & Co. vs. The United States*, namely, that the Supreme Court of the United States has decided that duties paid without a legal protest are not illegally exacted. (*Lawrence vs. Caswell*, 13 Howard, 488, 496.)

When the claimants contend that the duties in question ought not to be retained in the treasury, they forget that those duties are so

retained, not for the money involved, but in obedience to the statute of 1845, which Congress, for wise purposes, has thought proper to enact. They forget that, as regards the collection of duties on imports, Congress has the right to prescribe, by law, what rules it thinks proper; and that all persons who choose to import goods subject to duty, must conform to the rules which the law prescribes.

My opinion, therefore, is, that the petition shows no ground for relief.

DAVID WOOD *vs.* THE UNITED STATES.

Dissenting opinion delivered by Blackford, J.

This is a suit for overcharged duties. The particulars of the claim will sufficiently appear from the following extract from the petition :

“ Your petitioner respectfully represents, that during the years 1847, 1848, 1849, 1850, and 1851, he imported into the United States certain quantities of liquors in casks, on which importations duties were imposed and paid by him to the United States, not only on the value of the quantity of liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation, which was lost—which did not exist at the time when the duty was imposed—which was not and could not be imported into the United States. Your petitioner claims a return of the moneys exacted from him as import duties on such leakage or non-imported liquors.”

There is no allegation in the petition that any objection whatever was made to the payment of the said duties.

No evidence has been taken in the case; and the only question now before the court is, whether the petition shows a good cause of action. The decision of a majority of the court is, that the petition is sufficient. From that decision I dissent. The ground of my dissent is, that the duties in question were paid without objection. The dissenting opinions heretofore delivered by me in the cases of *Sturges, Bennet & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*, are referred to as a part of this opinion. In the examination of those cases, I became entirely satisfied that the act of Congress of 1845, cited and relied on by me, was a bar to the claims; and as I consider that act to be a bar in those cases, I, of course, consider it to be a bar in this case.

Since the judgment of the majority of the court in the present case was rendered, I have met with a decision of the district court of the United States for the eastern district of Pennsylvania, which clearly shows that, even *before the act of 1845*, overcharged duties paid without objection could not be recovered back from the United States. Such payments made without objection are what the law denominates voluntary payments; and the law is well settled that money so paid cannot be recovered back. This principle not only applies to the

present case, but is also applicable to the aforesaid cases of *Sturges, Bennet & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*. The decision of the district court of the United States, above alluded to, is as follows :

An action was brought by the United States against Clement & Newman on a custom-house bond, dated 30th of June, 1841, conditioned for the payment of \$793, that sum being part of the duties charged on an invoice of molasses imported by the defendants from Cuba into Philadelphia. The defendants claimed, among other things, a set-off of \$345 22, being an alleged overcharge of duties previously paid by them. Mr. Watts, the district attorney, said in his argument that though the amount claimed there was small, the principle involved the restoration of an immense sum—not only fifteen or twenty thousand dollars, before paid by those defendants, but millions to other importers throughout the United States, paid by them voluntarily and without protest. * * * * To the second credit the defendants ask for, we reply, first, that is covered by the same objections as the other ; and, second, that the duties on which it is founded were paid voluntarily, and could not be recovered by the defendants, they having given no proof of compulsion or protest. Mr. Cadwalader, for the defendants, said : Both our claims for credit or set-off rest on these reasons, but the second is met by the additional objection that it was a voluntary payment without protest, and is therefore not recoverable against the United States. We reply that there is evidence of a protest to go to the jury, and that it was not a voluntary payment. It was required as a preliminary to entry, and was exacted *colore officii*, and is therefore not voluntary, and may be admitted as a set-off. The judge (27th of March, 1843,) charged the jury as follows :

“ If the jury believe that the value of the sugar or molasses embraces all costs and charges at the place of exportation, including the costs of hogsheads, barrels, boxes, &c., necessary to enable the parties to export it, then it will be unnecessary further to consider the question ; should they think otherwise, then a new question arises for their consideration, and that is, were the duties on this shipment paid voluntarily and without objection, in consequence of the parties mistaking the law ; if they were so paid, they cannot be recovered back, or deducted from the claim of the United States. It has been argued that a payment to a public officer cannot be considered as a voluntary payment, as he holds the compulsory power in his own hands. This may be so, where the party paying objects, at the time of payment, to the propriety and legality of the charge. It is not necessary there should be a formal written protest, but there must be some objection, some notice that the claim is disputed, as the ground of objection or dispute may be removed or agreed to ; but if paid without such objection, merely on a mistaken construction of the law, it is binding, and cannot be recovered back, or set off against another demand. Was there any such notice or objection by the defendants at the time of payment ? The only evidence on their part is that of Mr. Newman, who says there was no formal protest, but Mr. Clement informed him

there was a mistake in calculating the duties, and that he (Mr. Clement) had been talking to Mr. Kern about it. Mr. Kern, who was a deputy collector, is since deceased; his testimony was not taken in his lifetime, and no witness is produced who heard the conversation. On the other side, Mr. Howell, deputy collector; Mr. Martin, the cashier; Mr. Bell, the ascertaining clerk; and Mr. McAdam, the bond clerk, have all been examined, and each of them say they never heard of any complaint by the defendant; and Mr. Howell states, that if such a complaint had been made, it would have been within his peculiar duty to examine it; but he knows of none. Still, this is a question of fact for the jury, and it is their province to decide it, the burden of proof being on the defendants. If you are satisfied that a duty was charged on the boxes, or hogsheads, over and above the value of the sugar, or molasses, at the time and place of exportation, and that such excess was paid by the defendants, they at the same time protesting or complaining against the justness or legality of the demand, then they are entitled to deduct the amount of such excess from the sum claimed in this suit. If, however, you believe that no excess was charged, or, if charged, that it was paid voluntarily, and without complaint, it is binding on the defendants, and they will not be entitled to the deduction." Verdict for the plaintiffs. *United States vs. Clement & Newman*, Crabbe's Reports, 499 to 515.

In the case just referred to, as before stated, the United States were the plaintiffs, and Clement & Newman the defendants. The defendants claimed as a set-off a certain sum as having been paid for overcharged duties. The court decided, in 1843, that if the duties had been paid without objection, the payment was voluntary, and could not be recovered back from the United States. That was the law, as said case decides, after the act of Congress of 1839, and before the act of 1845, relative to overcharged duties. When that decision was made, a verbal objection made at the time of payment was sufficient to enable the party to recover back from the United States, by way of set-off, overcharged duties. But by the act of 1845 no such recovery can be had, unless the objection was made in writing, and the grounds of the objection stated.

The above-mentioned case of the United States *vs.* Clement & Newman was decided by a court of the United States, in which case the government of the United States was itself a party. The decision is entitled to great respect, and I cite it for the purpose of showing that, independently of the act of 1845, there is no foundation for the present claim, as described in the petition. That decision is in direct opposition to the judgment of the majority of the court in the present case.

The above are my reasons, in addition to those given in the cases of *Sturges, Bennet & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*, for my dissent, in the present case, from the judgment of the court.

ERNEST FIEDLER.

[To accompany bill C. C. No. 20.]

JULY 28, 1856.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of Ernest Fiedler *vs.* The United States:

1. The petition of the claimant.
2. Claimant's brief.
3. Depositions taken in the case, and transmitted to the House of Representatives.
4. Claimant's statement showing the amount demanded, transmitted to the House of Representatives.

5. Opinion of the court in favor of the claim.

6. Dissenting opinion of Judge Blackford.

7. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this tenth day of July, A. D. 1856.

SAML. H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Court of Claims:

The petition of Ernest Fiedler, of the city of New York, merchant, respectfully represents, that the government of the United States is justly indebted to your petitioner for money had and received, illegally exacted of your petitioner by the collector of the customs, duly authorized by the said government to act as such collector at the port of New York.

Your petitioner further shows, that on or about the 19th day of June, 1854, your petitioner addressed a letter to the Treasury Department, as follows:

“NEW YORK, *June 18, 1854.*

“The petition of Ernest Fiedler, importing merchant, of the city of New York, respectfully represents, that he has imported into the port of New York divers importations of ammonia, and, on entry of the same for consumption, was required to pay duties after the rate of 20 per centum, the legal duty being 10 per cent.; and the excess of duty paid on said importations amounts to \$554 10, a statement of which is forwarded herewith.

“Your petitioner has applied at the collector’s office to the auditor for a certified statement of the excess of duties exacted on his several importations of ammonia, commonly called carbonate of ammonia, and the auditor offered to prepare a statement for part of such excess, viz: for so much as was paid under protest within six years last past, and declined to include anything more, whereby he disallows \$317 60 excess of duty paid without protest, and \$75 30 paid under protest, in February and April, 1847, more than six years since.

“Your petitioner further shows, that he, with Messrs. G. D. Phelps & Dodge, and H. M. Scheffelin & Fowler, and other importers of ammonia, undertook, by means of judicial decisions, to determine the legal rate of duty on ammonia, and a suit was instituted in November, 1849, in the name of George D. Phelps & Dodge *vs.* Cornelius W. Lawrence, and the plaintiffs recovered a judgment on the importations included in that suit. But inasmuch as the treasury did not acquiesce in that decision, it became necessary to institute the suits of H. M. Scheffelin & Fowler against collectors Lawrence and Maxwell, in December, 1851, which resulted in a decision, in January, 1854, that the duties imported of ammonia, commonly known as carbonate of ammonia, was 10 per cent., in which decision the department acquiesced.

“Your petitioner further shows, that in the years 1847, 1849, 1850, and 1851, it was understood to be the rule and practice of the Treasury Department to refund duties collected in excess, under decisions of the United States courts, paid with or without protest, whether such excess had been paid for less or more than six years; and that formal protest, at the time of payment, was advisable only so far as to secure a right of action against the collector, and the further right to collect by suit the interest in addition to the amount paid in excess.

“Your petitioner, intending to rely upon the decision to be made in the cases pending against the collectors to determine the legal rate of duty, and not intending to resort to a suit for the purpose of collecting interest, omitted on some of his entries to make the formal protest, and he did not (when the department was refunding duties paid for more than six years) enter suit merely to prevent the demand on the treasury from becoming outlawed.

“Your petitioner might now institute suit, and recover the interest with costs on a portion of his claim, and such interest and costs would amount to more than the sum of \$75 30 paid under protest in 1847.

“Considering that the cases of Phelps & Dodge and Scheffelin & Fowler, above referred to, were prosecuted in part to benefit your petitioner, and that he has not, by instituting suit, caused costs and damage to the department; and considering the uniform course of the department to refund under judgment on sums paid in excess, al-

though more than six years may have elapsed ; and that the department has had the money of your petitioner for a length of time without interest, and also \$317 60 paid without protest, your petitioner most respectfully requests that instructions may be given requiring the collector at the port of New York to examine the claim herewith presented, and to grant a certified statement of the excess of duties paid under protest by your petitioner in the years 1847, 1850, 1851, and 1852, on the importations referred to in said statement.

“ Very respectfully, your obedient servant,

“ E. FIEDLER.

“ Hon. JAMES GUTHRIE,

“ *Secretary of the Treasury.*”

Your petitioner further shows, that the Treasury Department refused to refund the excess of duties paid under protest for more than six years, but refunded so much of the excess of duties paid under protest as had been paid within six years, amounting to one hundred and sixty-one dollars and twenty cents, (\$161 20,) and the residue of excess now claimed amounts to \$392 90, as appears by the statement hereunto annexed.

Your petitioner further shows, that, by the act of July 30, 1846, section 1, and Schedule G, a duty of 10 per cent. ad valorem was imposed upon “ ammonia,” when imported into the United States. (9 Statutes at Large, 42.) In violation of which act, the collector of the customs at New York demanded and required of your petitioner a duty of 20 per cent. ad valorem to be paid by your petitioner upon his importations of ammonia aforesaid, as for duties due to the United States on the same ; and the money so exacted and paid by your petitioner, to the collector aforesaid, over and above the legal duties, amounted to three hundred and ninety-two dollars and ninety cents, (\$392 90) was by your petitioner paid to the collector of the customs, in order to obtain possession of his imports aforesaid, and, as your petitioner believes, the same was by the collector aforesaid, in the regular discharge of his official duties, paid over to the treasury of the United States ; all which will appear by the invoices, entries, and records of the collector’s office at the port of New York, to which, for greater certainty, your petitioner refers. Your petitioner further says, that no part of the excess of duties now claimed has been refunded to him, and his right to claim and receive the same has not been alienated by assignment or operation of law.

Wherefore, your petitioner, relying upon the justice of his claim, and the constitution of the United States, which provides that private property shall not be taken for public use without just compensation, (1 Statutes at Large, 21,) humbly prays your honorable court to grant such relief by a bill in favor of your petitioner as may be suitable and necessary, in order that the said sum of three hundred and ninety-two dollars and ninety cents may be refunded, with interest on the same from the time of payment.

ERNEST FIEDLER,

Per Emile H. Jacquelin, Attorney.

CHAS. E. SHERMAN,

Attorney.

NEW YORK, *July 26, 1855.*

STATE OF NEW YORK, }
 City of New York. } ss.

Emile H. Jacquelin, attorney for Ernest Fiedler, being sworn, says, that he has read the foregoing, and the facts stated in the petition are true, to the best of his knowledge and belief.

EMILE H. JACQUELIN,
Attorney.

Sworn to before me, this 26th day of July, 1855.

GEORGE F. BETTS,
United States Commissioner.

Statement of duties paid in excess on ammonia, by Ernest Fiedler, entered at the port of New York, from London.

Date of import.	Name of vessel.	Quantity in casks.	Amount of excess paid.	Amount paid under protest.
1846.				
November ..30	Warehoused.			
Entered.				
December ..12	Per St. James	10 barrels ..	\$36 80	
1847.				
February ..11	Per Victoria	10...do....	36 60	\$36 60
April 7	Northumberland	10...do....	38 70	38 70
May 10	Mediator	10...do....	36 40	
June 19	Hendrick Hudson	10...do....	37 90	
July 27	Westminster	10...do....	39 10	
November ..6	Sir Robert Peel	10...do....	34 60	
1849.				
July 25	Per Devonshire	10...do....	28 70	
August 27	Southampton	10...do....	32 50	
1850.				
May 11	Per Southampton	5...do....	19 40	
May 20	Independence	10...do....	41 10	41 10
1851.				
January ...15	Per Yorktown	10...do....	39 60	39 60
May 17	John Henry	10...do....	42 40	42 40
November ..3	Patrick Henry	10...do....	52 20	
1852.				
October 23	Per Ocean Queen	10...do....	38 10	38 10
	E. & O. E.		554 10	236 50

Of the above amount	\$554 10
There was refunded	161 20
Balance claimed, (with interest on the same).....	392 90

ERNEST FIEDLER.

Per EMILE H. JACQUELIN, *Attorney.*

NEW YORK, June 19, 1854.

ERNEST FIEDLER
against
THE UNITED STATES. } No. 185.

Brief of legal points and authorities according to rule 20.

The facts of this case are sufficiently set forth in the petition.

By the tariff act of July 30, 1846, section 1, Schedule G, a duty of 10 per cent. was imposed on "ammonia." (9 Stat. at Large, 42.)

This act was in force, and should have governed the collector in assessing the duty.

The collector exacted a duty of 20 per cent., and claimed as authority for doing so treasury instructions of December 31, 1847.

In behalf of the petitioners, it will be contended, on the case shown in the petition, and also in the evidence, that the collector erred—

In that he exacted a duty of 20 per cent. on ammonia, commonly called carbonate ammonia, and that ammonia, in this form, was liable to but 10 per cent., and so decided by the United States circuit court of New York, in the cases of George D. Phelps and Dodge *vs.* Lawrence, H. M. Scheffelin and Fowler *vs.* Lawrence, and same *vs.* Maxwell. See manuscript report in each case by the United States district attorney, transmitted to the Treasury Department; and by the Treasury Department, in a letter dated March 21, 1854, addressed to Collector Redfield, adopting said decisions as its rule of construction, and authorizing refunding duties on ammonia.

The excess of duty compulsorily and illegally exacted was \$554 10, of which sum there was refunded \$161 20 by the Secretary of the Treasury. The balance now claimed, \$392 90, was paid into the treasury of the United States.

The money so exacted and paid into the treasury may be recovered before this court, because the said money was obtained without law, and contrary to the act of July 30, 1846, section 1, Schedule G.

CHAS. E. SHERMAN,
JOHN ELY,
Attorneys for Petitioners.

STATE OF NEW YORK, }
City and County of New York. } ss.

On the 12th day of February, A. D. 1856, personally came Emile H. Jacquelin, the witness within named, and on the 14th day of Feb-

ruary, A. D. 1856, personally came James T. Griswold, the witness within named, and on the 15th day of February, A. D. 1856, personally came Henry M. Scheffelin, the witness within named; and after having been severally sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within depositions were written down by the commissioner, and then proposed by him to said witnesses severally, and the answers thereto were written down by the commissioner in the presence of said witnesses severally, who then severally subscribed said depositions in the presence of the commissioner.

The depositions of Emile H. Jacquelin, James T. Griswold, and Henry M. Scheffelin, taken at the request of John Ely, esq., counsel for the claimant, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Ernest Fiedler.

The adverse party was notified, did not appear, and did not object.

MALCOLM CAMPBELL,
Commissioner.

Commissioner's fees, \$23 55.

ERNEST FIEDLER vs. THE UNITED STATES.

February 7, 1856.—No witness being in attendance, and no one appearing on the part of the United States, on motion of Mr. Ely, counsel for the claimant, the examination is adjourned to February 12th instant, at 3 o'clock p. m.

MALCOLM CAMPBELL,
Commissioner.

FEBRUARY 12, 1856.

Emile H. Jacquelin sworn and examined for claimant.

Question. What is your name, age, occupation, and place of residence for the past year?

Answer. Emile H. Jacquelin; age, twenty-six years; my occupation is broker and commission merchant; my place of residence for the past year is New York.

Question. Have you any interest, direct or indirect, in the claim of Ernest Fiedler against the United States, and are you in any degree related to the claimant?

Answer. I have no interest whatever. I am not related to the claimant.

1st Int. Do you know the petitioner, Ernest Fiedler?

Answer. I do. I have been his clerk for about eleven years—until the 1st of January, 1856.

2d Int. Do you know whether the petitioner imported ammonia into the port of New York in either of the years 1846, 1847, 1849, 1850, or 1851? If yea, by what vessel or vessels, and at what time or times?

Answer. He did import ammonia in 1846 by the St. James; in

1847 by the Victoria, Northumberland, Mediator, Hendrick Hudson, Westminster, and Sir Robert Peel ; in 1849 by the Devonshire and Southampton ; in 1850 by the Southampton ; in 1851 by the Patrick Henry.

3d Int. Have you in your possession, or before you, the original invoices and entries of ammonia imported by the petitioner in the years 1846, 1847, 1849, 1850, or 1851? If yea, produce the same, or true copies thereof, and state from each entry before you the name of the vessel, the date of the entry, the dutiable value of the ammonia described in the same, and the amount of duty exacted and paid on ammonia ; how much does the amount so paid exceed a duty of ten per cent. ; and the date when the same was paid, and to whom the same was paid. Annex a true copy of each of said original invoices and entries to your answer hereto, including the protest, if any there be, and state also whether the duty exacted and paid on ammonia, specified in each of said entries, was accounted for in the accounts of the customs and paid over to the treasury of the United States ?

Answer. I have before me the original invoices and entries of ammonia imported by the petitioner, viz: the warehouse entry by the St. James, dated November 30, 1846, and the withdrawal entry, dated December 12, 1846. The dutiable value of the ammonia described in said entry was three hundred and sixty-eight dollars, and the duty paid on the same was seventy-three dollars and sixty cents, which exceeded a duty of ten per cent. by thirty-six dollars and eighty cents, which was paid on December 12, 1846, and was paid under protest, in writing, signed by the petitioner, which appears on the entry.

I have the original invoice and entry by the Victoria. The entry is dated February 11, 1847. The dutiable value of the ammonia described therein was three hundred and sixty-six dollars ; the duty paid on the same was seventy-three dollars and twenty cents, which exceeded a duty of ten per cent. by thirty-six dollars and sixty cents, which was paid on February 12, 1847, under protest, in writing, signed by the petitioner.

I have the original invoice and entry by the Northumberland. The entry is dated April 7, 1847. The dutiable value of the ammonia described in the same was three hundred and eighty-seven dollars, and the duty paid on the same was seventy-seven dollars and forty cents, which exceeded a duty of ten per cent. by thirty-eight dollars and seventy cents, which was paid April 7, 1847, under protest, in writing, signed by the petitioner.

I have the original invoice and entry by the Mediator. The entry is dated May 10, 1847. The dutiable value of the ammonia described in the same was three hundred and sixty-four dollars, and the duty paid on the same was seventy-two dollars and eighty cents, which exceeds a duty of ten per cent. by thirty-six dollars and forty cents, which was paid on May 12, 1847.

I have the original invoice and entry by the Hendrick Hudson. The entry is dated June 19, 1847. The dutiable value of the ammonia described in said entry was three hundred and seventy-nine dollars, and the duty paid on the same was seventy-five dollars and

eighty cents, which exceeded a duty of ten per cent. by thirty-seven dollars and ninety cents, which was paid on June 21, 1847.

I have the original invoice and entry by the Westminster. The entry is dated July 27, 1847. The dutiable value of the ammonia described therein was three hundred and ninety-one dollars, and the duty paid thereon was seventy-eight dollars and twenty cents, which exceeded a duty of ten per cent. by thirty-nine dollars and ten cents, which was paid on August 2, 1847.

I have the original invoice and entry by the Sir Robert Peel. The entry is dated November 16, 1847. The dutiable value of the ammonia described in the same was three hundred and forty-six dollars; the duty paid thereon was sixty-nine dollars and twenty cents, which exceeded a duty of ten per cent. by thirty-four dollars and sixty cents, which was paid November 23, 1847.

I have the original entry by the Devonshire, dated July 25, 1849. The dutiable value of the ammonia described in the same was two hundred and eighty-seven dollars, and the duty paid thereon was fifty-seven dollars and forty cents, which exceeded a duty of ten per cent. by twenty-eight dollars and seventy cents, which was paid on July 27, 1849.

I have the original entry by the Southampton, dated August 27, 1849. The dutiable value of the ammonia described in the same was three hundred and twenty-five dollars; the duty paid thereon was sixty-five dollars, which exceeds a duty of ten per cent. by thirty-two dollars and fifty cents, which was paid on September 1, 1849.

I have the original entry by the Southampton, dated May 11, 1850. The dutiable value of the ammonia described in the same was one hundred and ninety-four dollars; the duty paid thereon was thirty-eight dollars and eighty cents, which exceeds a duty of ten per cent. by nineteen dollars and forty cents, which was paid on May 29, 1850.

I have the original invoice and entry by the Patrick Henry. The entry is dated November 3, 1851. The dutiable value of the ammonia described in the same was five hundred and twenty-two dollars; the duty paid thereon was one hundred and four dollars and forty cents, which exceeds a duty of ten per cent. by fifty-two dollars and twenty cents, which was paid November 6, 1851.

The moneys paid upon the entries above mentioned, severally, were paid to the cashier, an officer of the custom-house in the collector's department. I have no copies of either of the invoices or entries to which I have testified. I cannot state whether or not the money paid for duties on said entries was accounted for in the accounts of the customs, or paid over to the treasury of the United States.

4th Int. What was the form or description of ammonia imported and entered by the petitioner, as described in the invoices and entries before you, and what is the most usual form in which ammonia is imported?

Answer. The form of ammonia imported and entered by petitioner was carbonate of ammonia, and that is the most usual form in which the petitioner has imported ammonia for the last eleven years. I do not know what is the most usual form in which it is imported by other importers.

5th Int. Has there been duties refunded to the petitioner on his importations of ammonia? If yea, in what form was the ammonia imported on which duties were refunded, and why were not the duties refunded on the ammonia described in the entries before you?

Answer. There have been duties refunded to the petitioner on his importations of ammonia, and the ammonia on which the duties were refunded was in the form of carbonate of ammonia. I cannot, of my own knowledge, state why the excess of duty on the ammonia described in the entries above mentioned was not refunded. I believe it was because there was no protest made in some cases; and in the other cases, I believe it was because more than six years had elapsed from the payment of duties when the refunding took place.

6th Int. Have you any interest in the matters inquired of in the preceding interrogations? If yea, state precisely the interest you have in the same.

Answer. I have already answered; I have no interest whatever.

Question. Do you know of any other matter relative to this claim of Ernest Fiedler *vs.* The United States? If you do, state it.

Answer. I know nothing further.

EMILE H. JACQUELIN.

Subscribed and sworn before me, this 12th day of February, 1856.

MALCOLM CAMPBELL,
Commissioner.

The examination is adjourned to February 14th instant, at 3 o'clock p. m.

MALCOLM CAMPBELL.
Commissioner.

FEBRUARY 14, 1856.

James T. Griswold sworn and examined for claimant.

Question. What is your name, age, occupation, and place of residence for the past year?

Answer. James T. Griswold, aged 43 years. I am refunding clerk in the collector's office in the New York custom-house. I reside in Brooklyn.

Question. Have you any interest, direct or indirect, in the claim of Ernest Fiedler against the United States, and are you in any degree related to the claimant?

Answer. I have no interest whatever. I am not related to him.

The witness being examined upon the interrogatories proposed to the witness Emile H. Jacquelin, herein above contained, to the first interrogatory, says: I do not know the petitioner, Ernest Fiedler.

To the second interrogatory he says: I only know of such importation from the entries and invoices before me.

To the third interrogatory he says: I have the original invoices and entries of ammonia imported by the petitioner in the years 1846, 1847, 1849, 1850, and 1851, which I produce in compliance with a subpoena addressed to Heman J. Redfield, collector, acting as his substitute, which invoices and entries are records belonging to the

collector's office. I have the warehouse entry of ammonia imported by the St. James, dated November 20, 1846, and the original invoice and withdrawal entry of ammonia imported in the same ship. This entry is dated December 12, 1846. The dutiable value of the ammonia described in the same was three hundred and sixty-eight dollars; the duty paid thereon was seventy-three dollars and sixty cents, which exceeded a duty of ten per cent. by thirty-six dollars and eighty cents, and was paid December 12, 1846.

I have the original invoice and entry of ammonia imported by the Victoria. The entry is dated February 11, 1847. The dutiable value of the ammonia described in the same was three hundred and sixty-six dollars, and the duty paid thereon was seventy-three dollars and twenty cents, which exceeded a duty of ten per cent. by thirty-six dollars and sixty cents, and was paid February 12, 1847.

I have the original invoice and entry by the Northumberland. The entry is dated April 7, 1847. The dutiable value of the ammonia described in the same was three hundred and eighty-seven dollars, and the duty paid thereon was seventy-seven dollars and forty cents, which exceeded a duty of ten per cent. by thirty-eight dollars and seventy cents, which was paid on April 7, 1847.

There is on the withdrawal entry by the St. James, the entry by the Victoria, and the entry by the Northumberland, a protest in writing, purporting to be signed by the petitioner, in which the petitioner protests against paying twenty per cent., and claimed that it should be ten per cent.

I have the original invoice and entry by the Mediator. The entry is dated May 10, 1847. The dutiable value of the ammonia described in the same was three hundred and sixty-four dollars, and the duty paid thereon was seventy-two dollars and eighty cents, which exceeded a duty of ten per cent. by thirty-six dollars and forty cents, and was paid on May 12, 1847.

I have the original invoice and entry by the Hendrick Hudson. The entry is dated June 19, 1847. The dutiable value of the ammonia described in the same was three hundred and seventy-nine dollars, and the duty paid thereon was seventy-five dollars and eighty cents, which exceeded a duty of ten per cent. by thirty-seven dollars and ninety cents, and was paid on June 21, 1847.

I have the original invoice and entry by the Westminster. The entry is dated July 27, 1847. The dutiable value of the ammonia described in the same was three hundred and ninety-one dollars, and the duty paid thereon was seventy-eight dollars and twenty cents, which exceeded a duty of ten per cent. by thirty-nine dollars and ten cents, and was paid on August 2, 1847.

I have the original invoice and entry by the Sir Robert Peel. The entry is dated November 16, 1847. The dutiable value of the ammonia described in the same was three hundred and forty-six dollars, and the duty paid thereon was sixty-nine dollars and twenty cents, which exceeded a duty of ten per cent. by thirty-four dollars and sixty cents, and was paid November 23, 1847.

I have the original entry by the Devonshire, dated July 25, 1849. The dutiable value of the ammonia described in the same was two hundred and eighty-seven dollars, and the duty paid thereon was

fifty-seven dollars and forty cents, which exceeded a duty of ten per cent. by twenty-eight dollars and seventy cents, and was paid on July 27, 1849.

I have the original entry by the Southampton, dated August 27, 1849. The dutiable value of the ammonia described in the same was three hundred and twenty-five dollars, and the duty paid thereon was sixty-five dollars, which exceeded a duty of ten per cent. by thirty-two dollars and fifty cents, and was paid on September 1, 1849.

I have the original entry by the Southampton, dated May 11, 1850. The dutiable value of the ammonia described in the same was one hundred and seventy-four dollars, and the duty paid thereon was thirty-eight dollars and eighty cents, which exceeded a duty of ten per cent. by nineteen dollars and forty cents, and was paid on May 29, 1850.

I have not produced the invoices by the last three vessels above named, called for in the subpoena, because they have not been found on file.

I have the original invoice and entry by the Patrick Henry. The entry is dated November 3, 1851. The dutiable value of the ammonia described in the same was five hundred and twenty-two dollars, and the duty paid thereon was one hundred and four dollars and forty cents, which exceeded a duty of ten per cent. by fifty-two dollars and twenty cents, and was paid on the 6th of November, 1851.

The duties paid on the several entries above stated were paid to the collector of the customs, or to the cashier in the office of the collector, an officer whose duty it is to receive money in payment of duties due the United States.

I have no true copies of any of the invoices or entries above mentioned, nor of the protests, the substance of which I have stated. From my position as refunding clerk, I can state that the duty paid on the ammonia specified in each of the entries to which I have testified, was accounted for in the accounts of customs in this district, and paid over to the treasury of the United States.

To the fourth interrogatory he says: The ammonia imported and entered by the petitioner in the invoices and entries before me is carbonate of ammonia. I am unable to say what is the most usual form in which ammonia is imported.

To the fifth interrogatory he says: I do not recollect.

To the sixth interrogatory he says: I have already stated that I have no interest.

Last interrogatory: Do you know any other matter or thing, or have you heard, or can you say anything touching the matters of the question in this cause that may tend to the advantage of the petitioner beyond what you have already been interrogated unto? Declare the same fully and at large as if you had been particularly interrogated thereunto.

Answer. I know that under treasury instructions carbonate of ammonia is admitted to entry at the custom-house upon payment of a duty of ten per cent., and that the excess of duty over ten per cent.

on that article has been refunded in some cases, the same having been paid under protest.

Question. Do you know of any other matter relative to the claim in question? if you do, state it.

Answer. I know nothing further.

JAMES T. GRISWOLD.

Subscribed and sworn before me, this 14th day of February, 1856.
MALCOLM CAMPBELL,
Commissioner.

The examination is adjourned until February 15, at 12 o'clock m.
MALCOLM CAMPBELL,
Commissioner.

FEBRUARY 15, 1856.

Henry M. Scheiffelin sworn and examined for claimant.

Question. What is your name, age, occupation, and place of residence for the past year?

Answer. Henry M. Scheiffelin, aged 47 years, merchant, residing in the city of New York.

Question. Have you any interest, direct or indirect, in the claim of Ernest Fiedler against the United States, and are you in any degree related to the petitioner.

Answer. I have no interest whatever. I am not related to him.

The witness being now examined upon the interrogatories proposed to the witness Jacquelin, herein above contained—

To the first interrogatory says: I know the petitioner, Ernest Fiedler.

To the second interrogatory he says: I know nothing.

To the third interrogatory he says: I have no such invoices or entries before me, and I therefore know nothing.

To the fourth interrogatory he says: I have no invoices or entries before me. Ammonia is most usually imported in the form of carbonate of ammonia. It is also imported in the form of muriate of ammonia, which is sometimes called sal ammoniac, and also in the form of sulphate of ammonia. It may have been imported in the form of aqua ammonia, but that is generally manufactured in this country. My importations have been chiefly in the form of carbonate of ammonia, and I presume that more of the carbonate is imported than any other form.

To the fifth interrogatory he says: I know nothing.

To the sixth interrogatory he says: I have already stated that I have no interest.

Lastly. Do you know any other matter or thing, or have you heard, or can you say anything touching the matters of the question in this cause that may tend to the advantage of the petitioner beyond what you have been interrogated unto. Declare the same fully and at large as if you had been particularly interrogated thereunto.

Answer. The article ammonia is a gas, as it is known in chemistry, and is never in that shape an article of commerce; when combined

with carbonic acid gas it becomes a solid, called carbonate of ammonia, and is so known in commerce. When combined with muriatic acid gas it produces the form known as muriate of ammonia, and is known in commerce by that name, and also as sal ammoniac. When combined with sulphuric acid it produces the form known as sulphate of ammonia. These are all ponderous solids, making convenient forms for transporting a large bulk of gas in a small space. I have dealt in ammonia in different forms for twenty-five years, during which time ammonia has been imported more or less in the forms of carbonate of ammonia and muriate. I cannot say when the importations became considerable in the sulphate of ammonia, but I think it was imported prior to 1846.

Question. Do you know of any other matter relative to the claim in question? If you do, state it.

Answer. I know that by the tariff act of 1846, sal ammoniac and ammonia are enumerated as liable to a duty of ten per cent. I know that my firm was charged a higher rate than ten per cent. on carbonate of ammonia, against which we protested, claiming that it was only liable to a duty of ten per cent. The question was tested at law, as to the rate of duty on carbonate of ammonia, and we recovered back the excess of duty above ten per cent.

H. M. SCHEIFFELIN.

Subscribed and sworn before me, this 15th day of February, A. D. 1856.

MALCOLM CAMPBELL,
Commissioner.

STATE OF NEW YORK, }
City and County of New York. } ss.

John Ely, being sworn, says, that on the 15th day of January, 1856, he served a notice upon M. Blair, esq., United States solicitor of the Court of Claims, a copy of which is hereunto annexed, by leaving the same, addressed to the said solicitor, with Samuel H. Huntington, clerk of the Court of Claims, at the office of said clerk, at the Capitol, Washington, D. C.

JOHN ELY.

Sworn to before me, this 12th day of February, 1856.

MALCOLM CAMPBELL,
Commissioner of Court of Claims.

ERNEST FIEDLER.—*Claim for duties* }
illegally exacted on ammonia. } Notice under rule XI.

WASHINGTON, January 15, 1856.

Please to take notice that I propose to take depositions in the above entitled cause before John E. Develin, commissioner, or some other

commissioner, of the city of New York, appointed by the justices of the Court of Claims, and to examine as witnesses Heman J. Redfield, collector, or such officer of the revenue as he may substitute in his place, Emile H. Jacquelin, and any other person, all of the city of New York, on the seventh day of February next, at half-past three p. m., at the office of the commissioner aforesaid; and that said witnesses will be examined on the interrogatories hereunto annexed.

JOHN ELY,

Attorney for Petitioners.

M. BLAIR, Esq.,

U. S. Solicitor, Court of Claims.

Interrogatories to be administered to Heman J. Redfield, collector, or such officer of the revenue as he may substitute in his place, Emile H. Jacquelin, and any other person, all of the city of New York, witnesses to be produced, sworn, and examined, before John E. Develin, commissioner, or some other commissioner, for the city of New York, appointed by the justices of the Court of Claims, in a certain cause now pending in the Court of Claims, on the petition of Ernest Fiedler:

1st Int. Do you know the petitioner, Ernest Fiedler?

2d Int. Do you know whether the petitioner imported ammonia into the port of New York in either of the years 1846, 1847, 1849, 1850, or 1851? If yea, by what vessel or vessels, and at what time or times?

3d Int. Have you in your possession, or before you, the original invoices and entries of ammonia imported by petitioner in the years 1846, 1847, 1849, 1850, or 1851? If yea, produce the same, or true copies thereof, and state from each entry before you the name of the vessel, the date of the entry, the dutiable value of the ammonia described in the same, and the amount of duty exacted and paid on ammonia; how much does the amount so paid exceed a duty of ten per-cent.; and the date when the same was paid, and to whom the same was paid. Annex a true copy of each of said original invoices and entries to your answer hereto, including the protest, if any there be, and state also whether the duty exacted and paid on ammonia, specified in each of said entries, was accounted for in the accounts of the customs, and paid over to the treasury of the United States.

4th Int. What was the form or description of ammonia imported and entered by petitioner, as described in the invoices and entries before you, and what is the most usual form in which ammonia is imported?

5th Int. Have there been duties refunded to the petitioner on his importations of ammonia? if yea, in what form was the ammonia imported on which duties were refunded? and why were not the duties refunded on the ammonia described on the entries before you?

6th Int. Have you any interest in the matters inquired of in the preceding interrogatories? if yea, state precisely the interest you have in the same.

Lastly. Do you know any other matter or thing, or have you heard,

or can you say anything touching the matters of the question in this cause that may tend to the advantage of the petitioner beyond what you have been interrogated unto? Declare the same fully and at large as if you had been particularly interrogated thereunto.

JOHN ELY.

ERNEST FIEDLER's claim }
for duties illegally ex- } *Petitioner's demand, as proved in the an-*
acted on ammonia. } *swers of Griswold to the interrogatories.*

The petitioner asks for judgment for duties collected in excess, all over ten per cent., viz :

1846, December 12. On imports per "St. James".....	\$36 80
1847, February 11. On imports per "Victoria".....	36 60
April 12. On imports per "Northumberland".....	38 70
This amount paid under protest.....	112 10
May 10. On imports per "Mediator".....	36 40
June 19. On imports per "Hendrick Hudson".....	37 90
July 27. On imports per "Westminster".....	39 10
November 16. On imports per "Sir Robert Peel"....	34 60
1849, July 25. On imports per "Devonshire".....	28 70
August 27. On imports per "Southampton".....	32 50
1850, May 11. On imports per "Southampton".....	19 40
1851, November 3. On imports per "Patrick Henry".....	52 20
Amount of excess of duty.....	392 90
We ask for interest at 6 per cent from the date of payment to the 27th May, 1856.....	184 45
For cost of commissioner in taking depositions used in evidence.....	\$23 55
For printing petition and brief.....	10 00
For counsel fees, drawing petition, interrogatories, and taking depositions.....	50 00
	83 50
	660 90

The facts on which I claim to recover are set in the petition, and established, in answer to the interrogatories, by the depositions of Emile H. Jacquelin and Schieffelin.

The amount deposed to by Griswold, the custom-house expert, is the same as claimed, amounting to \$392 90.

See remarks on statement to claim No. 184, Henry Meyer *et al.*

JOHN ELY,
Attorney for Claimant.

ERNEST FIEDLER *vs.* THE UNITED STATES.

Scarburgh, J., delivered the opinion of the court.

In the years 1846, 1847, 1849, 1851, and 1852, the petitioner imported into the United States divers quantities of carbonate of ammonia, on all of which a duty of twenty per centum ad valorem was exacted. He insists that it was subject to a duty of ten per centum ad valorem only. 9 Stat. at Large, pp. 42, 48, Schedule G.

The case is, in its circumstances, like the case of Henry and Frederick W. Meyer *vs.* The United States, and to be governed by the same principles. See the opinion of this court in that case, and the opinions thereto appended. We are of the opinion that the ammonia imported by the petitioner was subject only to a duty of ten per centum ad valorem, and that the excess ought to be refunded to him.

The following table will show when the duties were paid; in what vessels the ammonia was imported; the amount of duties actually paid; the amount of duties, at ten per centum ad valorem; and how much was paid under protest:

When paid.	Vessel.	Duties actually paid.	Duties at ten per centum ad valorem.	Paid under protest.
1846.				
December ... 12	St. James	\$73 60	\$36 80	\$36 80
1847.				
February ... 12	Victoria	73 20	36 60	36 60
April 7	Northumberland	77 40	38 70	38 70
May 12	Mediator	72 80	36 40	
June 21	Hendrick Hudson	75 80	37 90	
August 2	Westminster	78 20	39 10	
November ... 23	Sir Robert Peel	69 20	34 60	
1849.				
July 27	Devonshire.....	57 40	28 70	
September... 1	Southampton	65 00	32 50	
1850.				
May 29	Southampton	38 80	19 40	
1851.				
November .. 6	Patrick Henry.....	104 40	52 20	

Excess claimed, to be refunded, \$392 90.

We shall report to Congress a bill in favor of the petitioner for three hundred and ninety-two dollars and ninety cents.

ERNEST FIEDLER *vs.* THE UNITED STATES.

Dissenting opinion by Judge Blackford.

Suit for overpaid duties.

I dissent from the final judgment rendered in this case by a majority of the court in favor of the claimant.

As to the duties on the imports by the *St. James*, *Victoria*, and *Northumberland*, one of the witnesses, *Jacquelin*, says there were protests in writing, but says nothing as to the forms of the protests. Another witness, *Griswold*, says there is on the entries in those three cases, "a protest in writing, purporting to be signed by the petitioner, in which the petitioner protests against paying twenty per cent., and claims that it should be ten per cent." The objection to this evidence is, 1. That copies of the protests should have been produced to this court. 2. That the act of Congress of 1845 requires that the protest shall state "*distinctly and specifically the grounds of objection.*" 5 Stat. at Large, 727. The saying that the duty should not be twenty but ten per cent. is merely stating a conclusion of law. There is no proof, therefore, of a legal protest in either of those three cases; and that is the ground of my dissent in those cases.

As to the duties on the imports by the other vessels—namely, *Mediator*, *Hendrick Hudson*, *Westminster*, *Sir Robert Peel*, *Devonshire*, *Southampton*, and *Patrick Henry*—the payments were made without any objection whatever, either written or verbal. That is the ground of my dissent in the last named cases.

The dissenting opinions heretofore delivered by me in the cases of *Sturges, Bennet & Co. vs. The United States*, *Spence & Reid vs. The United States*, and *Wood vs. The United States*, are hereto appended, and referred to as a part of this opinion.

STURGES, BENNET & CO. *vs.* THE UNITED STATES.

The dissenting opinion was delivered by Judge Blackford.

I am obliged to dissent from the judgment of the court in this case.

The petition attached to this opinion shows the grounds of the claim. The duties sued for were collected during the years 1847, 1848, 1849, 1850, and 1851.

The petition, in my opinion, is defective, because it does not allege that any of the duties were paid *under protest*. The act of Congress of 1845, chapter 22, prohibits any suit against a collector for overpaid duties, if the payment was made without protest. That point is expressly decided by the circuit court of the United States for the Maryland district, at the April term, 1849, in *Brune vs. Marriott*. In that case, the protest was not made until *after* some of the duties were paid, and the decision was, that for such of the duties there could be no recovery. The language of the court is as follows: "The remaining question is, what duties were paid under protest, within the meaning of the act of 1845? That act requires that the protest shall be made in writing, signed by the claimant, at or before the

payment of the duties, and set forth, distinctly and specifically, the grounds of objection. The protest of April 9, 1847, cannot apply to the payments previously made, and the plaintiff is not entitled to recover them. But it is sufficient to cover all subsequent payments," &c.

If there has been a protest, the suit is allowed, as the statute expressly says, in order "to ascertain and try the legality and validity of such demand and payment of duties." I consider that statute to be as applicable to a suit in this court, against the government for overpaid duties, as it is to a suit for that cause, in any other court, against the collector. The object of both suits is the same, namely, to ascertain and try the legality and validity of the demand and payment of duties alleged to have been overpaid. If such demand and payment of duties were legal and valid, the importer cannot, in a court professing to be governed by legal principles, recover those duties, either from the collector or from the government. That appears to me to be a clear proposition. Congress has thought proper, by the law of 1845, to prescribe a certain rule for the collector and importer relative to the collection of duties; and whilst the law is in force, the rule must be complied with. The rule is, that if the importer wishes to object to the amount of duty charged, the objection must be made at or before the payment of the duty. If no objection be made within the time limited by law, the demand and payment of the duty must be considered legal and valid.

It will be observed that the statute of 1845, which prohibits any suit for overpaid duties, unless there has been a sufficient protest, applies to duties of every description, without exception.—5 Stat. at Large, 727. The effect of this statute relative to the protest is clearly stated in an opinion delivered by Chief Justice Taney in 1849. His language is as follows: "The protest is not required to be made on or before the payment of what are called the estimated duties. For this payment is necessarily regulated by the invoice quantity, as well as the invoice price. The importer cannot, at that time, know whether there has been any loss by leakage; nor can he know, after it has been ascertained by the weigher and gauger, whether the collector will exact duties upon the amount stated in the invoice.

"The payment is legally made when the duties are finally determined, and the amount assessed by the collector; and a protest before or at that time is sufficient notice, as it warns the collector, before he renders his account to the Treasury Department, that he will be held personally responsible if the portion disputed is not legally due, and that the claimant means to assert his right in a court of justice.

"The payment of the money upon the estimated duties is rather in the nature of a pledge or deposit than a payment. For it remains in the hands of the proper officer, subject to the final assessment of the duties; and if more has been paid than is due, (which is most commonly the case,) the overplus belongs to the importer, and is returned to him." *Brune vs. Marriott*, before cited. The Supreme Court affirmed that judgment, using, as to the protest, the following language: "But where the duties had not been closed up in any cases, when the written protest, in April, was filed—though the preliminary

payment of the estimated duties had taken place—the court justly considered the protest valid. Because, till the final adjustment, the money remains in the hands of the collector, and is not accounted for with the government, and more may be necessary to be paid by the importer.” *Marriott vs. Brune*, 9 How., 619, 636.

The law is therefore settled, that under the aforesaid statute of 1845 the importer is not required to make his protest until after the weigher or gauger has made his return, and the importer has had a full opportunity to know what that return is, and for what sum he is legally chargeable. That being the law, it is clear that there can be no hardship or injustice in requiring the protest. But, on the other hand, if at any distance of time after duties have been paid without objection, and with a full opportunity of knowing the facts, the United States are to be subject to be called upon for alleged overpaid duties, there will be no end to the evils that will ensue.

The language of the Supreme Court of the United States in 1851, with respect to the question now under consideration, is as follows: “But it is proper to say, in order that the opinion of the court may not be misunderstood, that when we speak of duties illegally exacted, the court mean to confine the opinion to cases like the present, in which the duty demanded was paid under protest, stating specially the ground of objection. Where no such protest is made, the duties are not illegally exacted, in the legal sense of the term; for the law has confided to the Secretary of the Treasury the power of deciding, in the first instance, upon the amount of duties due on the importation. And if the party acquiesces, and does not, by his protest, appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal to which the law has confided the power of deciding the question.

“Money is often paid under the decision of an inferior court, without appeal, upon the construction of a law which is afterwards, in some other case, in a higher and superior court, determined to have been an erroneous construction. But money thus paid is not illegally exacted. Nor are duties illegally exacted where they are paid under the decision of the collector, sanctioned by the Secretary of the Treasury, and without appealing from that decision to the judicial tribunals by a proper and legal protest. Nor are they within the principle decided in the case before us.” *Lawrence vs. Caswell*, 13 Howard, 488, 496. That is the unanimous opinion of the highest judicial tribunal in the United States, on the precise question now before us. It is the opinion of that court on the meaning of the act of Congress of 1845, before referred to. That opinion is, that duties paid *without protest*, as the duties in the case before us were paid, are not illegally exacted. And surely, if the duties now sued for were not illegally exacted, that is, if the collection of those duties was lawful, the claimants can have no right, in a court of justice, to recover them back, either from the collector or from the government.

My opinion is, therefore, that the petition shows no ground for relief.

SPENCE & REID, CONSIGNEE AGENTS OF MASON & TULLIS, *vs.* THE UNITED STATES.

[The petition of the claimants is hereto attached.]

Dissenting opinion delivered by Judge Blackford.

I dissent from that part of the judgment in this case which sustains the present suit as to certain overcharged duties.

The duties in question were paid to the collector without a written protest setting forth the grounds of objection, and were afterwards paid by the collector into the treasury of the United States.

The decision of the court is, that duties paid without such protest may be recovered back by a suit in this court. That decision is, in my opinion, contrary to the act of Congress of 1845, chapter 22.

The dissenting opinions delivered by me in the cases of *Sturges, Bennet & Co. vs. The United States*, and of *Beatty vs. The United States*, are hereto attached and made part of this opinion.

Mason & Tullis, for whose use this suit is brought, sued the collector in Baltimore for overcharged duties on the same pimento mentioned in the present petition. The circuit court of the United States decided in that case that the suit was, in substance, a suit against the United States, and that "*the money was in the treasury, and must be paid from the treasury if the plaintiff recover.*" They also decided that the suit would not lie, because there was no legal process. (*Mason & Tullis vs. Kane*, circuit court of the United States for the Maryland district, April term, 1851.) That decision is in direct opposition to the present decision of this court in substantially the same case. The consequence of the judgment in this case is as follows: A merchant sues a collector in a circuit court of the United States for overcharged duties. The effect of the suit, if successful, is to obtain from the treasury of the United States the amount of those duties. But the suit fails for *the want of a legal protest*. The same merchant then turns round and sues the United States, in the Court of Claims, for the same duties, and recovers *without such protest*. One court decides that the treasury of the United States is liable upon the same state of facts on which the other decides that the treasury is not liable. It is impossible that these contradictory decisions can both be right.

The act of 1845 prescribes the condition upon the performance of which, and only upon such performance, a suit will lie for overpaid duties. That condition is the making of a legal protest within the proper time. The policy of the act is very clear. It is noticed by Chief Justice Taney, in the following words: "Now the act of February 26, 1845, in express terms, provides, that no action of this kind shall be maintained against a collector, 'unless the said protest was made in writing, and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.'"

"It is not, therefore, sufficient to object to the payment of any particular duty or amount of duty, and to protest in writing against it. The claimant must do more. He must set forth in his protest the grounds upon which he objects, distinctly and specifically. And these latter words are too emphatic to be regarded as mere surplusage, or

to be overlooked in the construction of this law. The object of this provision is obvious. In the multitude of collection offices in the United States, and the changes which so frequently take place in the officers, mistakes and oversights will sometimes take place, and irregularities in the assessment of duties. And the object of this provision is to prevent a party from taking advantage of such objections when it is too late to correct them, and to compel him to disclose the grounds of his objection at the time when he makes his protest. The case before the court strikingly exemplifies the policy of this provision. One of the objections is, that the merchant appraisers did not actually inspect the pimento. It was not actually looked at and inspected by these appraisers, because there was no controversy about its quality. The consignees had notice and appeared before the merchant appraisers, and did not suggest that there was any defect in the quality which would lower the value, nor express a wish to have it inspected. They offered to prove that it was bought for the price at which it was invoiced, and that such was then the market price at the place where it was purchased. The appraisers were satisfied that it was bought at the price stated, but were of opinion that the price was lower than its market value in the principal markets of the island, and appraised its dutiable value accordingly.

"There is not the slightest reason to suppose that their assessment would have been, in any degree, influenced or changed by the actual inspection of the article. And if this objection had been stated in the protest, the error could have been immediately corrected before the duties were exacted; but is now too late. And if this oversight be fatal to this appraisement, and renders it invalid, then the public lose not only the enhanced duties to which the pimento was liable, but also the additional or penal duty, which was the consequence of the merchant appraisal. The same may be said of the other grounds of objection above mentioned. If they had been set forth in the protest as the grounds of objection, and had been deemed tenable by the administrative department, the errors could have been corrected without the expense of litigation, and the duties which (the) law imposes secured to the public. And it is for this purpose that the act of 1845 requires the grounds of objection to be distinctly and specifically set forth in the protest. For this suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States." (*Mason & Tullis vs. Kane*, above cited.)

That opinion shows very clearly that the said act of 1845 is founded in sound policy. But whether it be so or not, no court can repeal it. Whilst it is in force it must be obeyed.

The only argument in the present case made by the claimant that appears to me to require an answer, is, that this suit is not against the collector, but is against the United States. That argument admits of a short and conclusive answer. It is this: The law is settled by said decision of the United States court, that a suit against the collector for overcharged duties is, in truth, a suit against the United States. So that, according to that decision, which is certainly correct, the mere fact that this suit is against the United States, and not against the collector, is no reason that the suit should be sustained.

I must be permitted to repeat here, what was said by me in *Sturges, Bennet & Co. vs. The United States*, namely, that the Supreme Court of the United States has decided that duties paid without a legal protest are not illegally exacted. (*Lawrence vs. Caswell*, 13 Howard, 488, 496.)

When the claimants contend that the duties in question ought not to be retained in the treasury, they forget that those duties are so retained, not for the money involved, but in obedience to the statute of 1845, which Congress, for wise purposes, has thought proper to enact. They forget that, as regards the collection of duties on imports, Congress has the right to prescribe, by law, what rules it thinks proper; and that all persons who choose to import goods subject to duty, must conform to the rules which the law prescribes.

My opinion, therefore, is, that the petition shows no ground for relief.

DAVID WOOD vs. THE UNITED STATES.

Dissenting opinion delivered by Blackford, J.

This is a suit for overcharged duties. The particulars of the claim will sufficiently appear from the following extract from the petition:

"Your petitioner respectfully represents, that during the years 1847, 1848, 1849, 1850, and 1851, he imported into the United States certain quantities of liquors in casks, on which importations duties were imposed and paid by him to the United States, not only on the value of the quantity of liquor ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation, which was lost—which did not exist at the time when the duty was imposed—which was not and could not be imported into the United States. Your petitioner claims a return of the moneys exacted from him as import duties on such leakage or non-imported liquors."

There is no allegation in the petition that any objection whatever was made to the payment of the said duties.

No evidence has been taken in the case; and the only question now before the court is, whether the petition shows a good cause of action. The decision of a majority of the court is, that the petition is sufficient. From that decision I dissent. The ground of my dissent is, that the duties in question were paid without objection. The dissenting opinions heretofore delivered by me in the cases of *Sturges, Bennet & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*, are referred to as a part of this opinion. In the examination of those cases, I became entirely satisfied that the act of Congress of 1845, cited and relied on by me, was a bar to the claims; and as I consider that act to be a bar in those cases, I, of course, consider it to be a bar in this case.

Since the judgment of the majority of the court in the present case was rendered, I have met with a decision of the district court of the United States for the eastern district of Pennsylvania, which clearly

shows that, even *before the act of 1845*, overcharged duties paid without objection could not be recovered back from the United States. Such payments made without objection are what the law denominates voluntary payments; and the law is well settled that money so paid cannot be recovered back. This principle not only applies to the present case, but is also applicable to the aforesaid cases of *Sturges, Bennet & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*. The decision of the district court of the United States, above alluded to, is as follows:

An action was brought by the United States against Clement & Newman on a custom-house bond, dated 30th of June, 1841, conditioned for the payment of \$793, that sum being part of the duties charged on an invoice of molasses imported by the defendants from Cuba into Philadelphia. The defendants claimed, among other things, a set-off of \$345 22, being an alleged overcharge of duties previously paid by them. Mr. Watts, the district attorney, said in his argument that though the amount claimed there was small, the principle involved the restoration of an immense sum—not only fifteen or twenty thousand dollars, before paid by those defendants, but millions to other importers throughout the United States, paid by them voluntarily and without protest. * * * * * To the second credit the defendants ask for, we reply, first, that is covered by the same objections as the other; and, second, that the duties on which it is founded were paid voluntarily, and could not be recovered by the defendants, they having given no proof of compulsion or protest. Mr. Cadwalader, for the defendants, said: Both our claims, for credit or set-off, rest on these reasons, but the second is met by the additional objection that it was a voluntary payment without protest, and is therefore not recoverable against the United States. We reply that there is evidence of a protest to go to the jury, and that it was not a voluntary payment. It was required as a preliminary to entry, and was exacted *colore officii*, and is therefore not voluntary, and may be admitted as a set-off. The judge (27th of March, 1843,) charged the jury as follows:

“If the jury believe that the value of the sugar or molasses embraces all costs and charges at the place of exportation, including the costs of hogsheads, barrels, boxes, &c., necessary to enable the parties to export it, then it will be unnecessary further to consider the question; should they think otherwise, then a new question arises for their consideration, and that is, were the duties on this shipment paid voluntarily and without objection, in consequence of the parties mistaking the law; if they were so paid, they cannot be recovered back, or deducted from the claim of the United States. It has been argued that a payment to a public officer cannot be considered as a voluntary payment, as he holds the compulsory power in his own hands. This may be so, where the party paying objects, at the time of payment, to the propriety and legality of the charge. It is not necessary there should be a formal written protest, but there must be some objection, some notice that the claim is disputed, as the ground of objection or dispute may be removed or agreed to; but if paid without such objection, merely on a mistaken construction of the law, it is binding, and

cannot be recovered back, or set off against another demand. Was there any such notice or objection by the defendants at the time of payment? The only evidence on their part is that of Mr. Newman, who says there was no formal protest, but Mr. Clement informed him there was a mistake in calculating the duties, and that he (Mr. Clement) had been talking to Mr. Kern about it. Mr. Kern, who was a deputy collector, is since deceased; his testimony was not taken in his lifetime, and no witness is produced who heard the conversation. On the other side, Mr. Howell, deputy collector; Mr. Martin, the cashier; Mr. Bell, the ascertaining clerk; and Mr. McAdam, the bond clerk, have all been examined, and each of them say they never heard of any complaint by the defendant; and Mr. Howell states, that if such a complaint had been made, it would have been within his peculiar duty to examine it; but he knows of none. Still, this is a question of fact for the jury, and it is their province to decide it, the burden of proof being on the defendants. If you are satisfied that a duty was charged on the boxes, or hogsheads, over and above the value of the sugar, or molasses, at the time and place of exportation, and that such excess was paid by the defendants, they at the same time protesting or complaining against the justness or legality of the demand, then they are entitled to deduct the amount of such excess from the sum claimed in this suit. If, however, you believe that no excess was charged, or, if charged, that it was paid voluntarily, and without complaint, it is binding on the defendants, and they will not be entitled to the deduction." Verdict for the plaintiffs. *United States vs. Clement & Newman*, Crabbe's Reports, 499 to 515.

In the case just referred to, as before stated, the United States were the plaintiffs, and Clement & Newman the defendants. The defendants claimed, as a set-off, a certain sum as having been paid for overcharged duties. The court decided, in 1843, that if the duties had been paid without objection, the payment was voluntary, and could not be recovered back from the United States. That was the law, as said case decides, after the act of Congress of 1839, and before the act of 1845, relative to overcharged duties. When that decision was made, a verbal objection made at the time of payment was sufficient to enable the party to recover back from the United States, by way of set-off, overcharged duties. But by the act of 1845, no such recovery can be had, unless the objection was made in writing, and the grounds of the objection stated.

The above-mentioned case of the *United States vs. Clement & Newman* was decided by a court of the United States, in which case the government of the United States was itself a party. The decision is entitled to great respect, and I cite it for the purpose of showing that, independently of the act of 1845, there is no foundation for the present claim as described in the petition. That decision is in direct opposition to the judgment of the majority of the court in the present case.

The above are my reasons, in addition to those given in the cases of *Sturges, Bennet & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*, for my dissent, in the present case, from the judgment of the court.

THOMAS CROWN.

[To accompany bill C. C. No. 21.]

JULY 28, 1856.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled :

The Court of Claims respectfully presents the following documents as the report in the case of Thomas Crown *vs.* the United States :

1. The petition of the claimant.
2. Depositions taken in the case and transmitted to the House of Representatives.

3. Documents relating to the case, received from the House of Representatives, and returned to that House in a separate envelope.

4. Solicitor's brief.

5. Briefs of the counsel for the claimant.

6. Opinion of the court.

7. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this tenth day
[L. S.] of July, A. D. 1856.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable the Judges of the Court of Claims of the United States :

The petition of Thomas Crown, of the city of Washington, respectfully sheweth :

That in the month of January, A. D. 1826, Captain George Blaney, captain of the United States corps of engineers, superintending the construction of the fortifications at Oak island, near the mouth of the Cape Fear river, in the State of North Carolina, issued proposals for the delivery of bricks at said Oak island, which were published in

the National Intelligencer from said month of January to the 15th day of March, 1826, as follows :

“Bricks wanted. Sealed proposals will be received at Wilmington and Smithville, North Carolina, until the 15th of March next, for the delivery at Oak island, near the mouth of the Cape Fear river, of six millions of bricks, as follows, viz :

2,000,000 to be delivered prior to the 1st July, 1826.

2,000,000 to be delivered prior to the 1st October, 1826.

2,000,000 to be delivered prior to the 1st December, 1826.

“The bricks must be hard-burned and of the best quality, and it is desirable that they should be of the size of the Philadelphia or New York bricks—the former being $8\frac{1}{2}$, $4\frac{1}{2}$, and $2\frac{1}{2}$, and the latter 8, 4, and 2 inches. Proposals will state which of these two sizes it is intended to deliver. Proposals will be accepted for a part of the above, say 100,000. It must be distinctly understood, by those who send proposals, that the contract will be so made, that the bricks will be liable to rejection if they do not pass the inspection of an officer of engineers or some other person who will be appointed for the purpose. A wharf will be in readiness previous to the 1st of April, where vessels can lie drawing nine feet at low water.

“GEORGE BLANEY,
“*Captain Corps of Engineers.*”

Your petitioner would further show, that he filed his proposals in pursuance of said advertisement with said Blaney, for the delivery of from 1,000,000 to 6,000,000 of bricks of the size of 8, 4, and $2\frac{1}{2}$ inches, at the rate of seven dollars and seventy-five cents per thousand, and on the 16th day of March, 1826, the said Blaney accepted the proposal of your petitioner and notified him to that effect, by a letter addressed to him as follows, viz :

“SMITHVILLE, N. C.,
“*March 16, 1826.*

“SIR: Your proposal for the delivery of from one to six millions of bricks for the fortifications to be erected at Oak island has been examined and is hereby accepted. In consequence of previous arrangements having been made, three millions is the number wanted, provided I can procure stone for the foundations. If that material cannot be procured, four and a half millions will be required.

“I am, very respectfully, your most obedient servant,

“G. BLANEY,
“*Captain Corps of Engineers.*

“MR. THOMAS CROWN,
“*Washington City.*”

And that at or near the same time, the said Blaney reported to the Engineer Department, at Washington, a list of proposals received by him for the delivery of brick at Oak island, agreeably to his advertisement, contained in the National Intelligencer, from January, 1826, to 15th March, 1826, and at the foot of said list makes the following

statement and certificate, viz: "Mr. Crown's proposals are accepted. He makes the bricks within five miles of Oak island."

"I certify that the contract entered into between Thomas Crown and myself for the delivery of 3,000,000 of bricks for the fortifications at Oak island was made on the most favorable terms that could be procured.

"GEORGE BLANEY,

"Captain Corps of Engineers;

as by said paper, a copy of which is hereto annexed, marked 'Exhibit 1,' will more fully appear."

And that, subsequently, the said Blaney, in behalf of the United States, and your petitioner, executed and delivered a written contract, under seal and dated on the said 16th day of March, 1826, for the delivery of 3,000,000 of bricks in pursuance of the proposals of your petitioner. To which said contract, a copy of which is hereto annexed, marked "Exhibit 2," your petitioner refers your honors and asks that the same may be taken as a part of this petition.

Your petitioner further shows, that he forthwith repaired to Smithville, near Oak island, with moulders, kiln-burners, laborers, and implements, at request of said Blaney, and proceeded faithfully in the performance of his work, under his contract with the United States, and by the 1st of July, 1826, had made about 800,000 bricks, as appears by a letter of said Blaney, dated 9th August, 1826, and of which said Blaney admitted that 250,000 could be received under the contract.

Your petitioner further shows, that said Blaney having forwarded to the Engineer Department a copy of said contract, by the direction of the head of that department, a letter was addressed to said Blaney, by J. L. Smith, captain of the corps of engineers, in which objections were made to said contract, and the same was declared to be a nullity, as will more fully appear by referring to said letter; a copy of which is hereto annexed, marked "Exhibit 3."

Your petitioner shows to your honors that said contract, entered into by said Blaney with your petitioner, was a valid and binding contract on the part of the government of the United States, and that said Blaney was fully authorized to make the same, and that the same was made strictly in conformity with the regulations existing in the Engineer Department, and in conformity with law; that no law or regulation of the department existed at that time requiring that any bond or any security furnished for the fulfilment of a contract, or that a part of the money to be paid to the contractor should be withheld until the termination of the contract. That the regulations, in force at the time when the contract was made with your petitioner, required that when the contracts were made they should be reported to the Engineer Department, "acompanied by a list of the proposals, and a certificate declaring them to have been made on the most reasonable terms that could be procured; and copies of all contracts so made must be forwarded to the Engineer Department;" and that said regulations were strictly complied with, and said list of proposals and certificate and a copy of the contract were duly forwarded to the depart-

ment. That there was no agreement or understanding between said Blaney and your petitioner, that said contract could be either modified, altered, or rescinded by either party, or that the approval of said contract by any superior officer was necessary in order that the said contract should continue in force as a valid and binding contract on the parties.

Your petitioner further shows, that, after receiving said communication from the Engineer Department, the said Blaney refused to fulfil the contract with your petitioner, and refused to accept bricks to the amount of 250,000 which he had declared could be received under the contract. That said Blaney, as a pretence for refusing to fulfil said contract, and to pay the amount due to your petitioner, declared that he had not the means to fulfil said contract, and was in debt to a person by the name of Potter; whereas your petitioner was indebted to said Potter in only the sum of about six hundred dollars, and if said Blaney had paid for the said 250,000 bricks at the rate agreed under said contract, the sum due to your petitioner, of \$1,937 50, he would have been relieved from his indebtedness, and could readily have fulfilled his contract. That said Blaney insisted upon his transferring his property to said Potter, and abandoning his said contract. That said Blaney thus forced your petitioner to abandon his said contract and sell out his brick-yard, implements, and bricks for the sum of six hundred and forty dollars to said Potter. That after said sale, the said Blaney received and accepted from said Potter all said bricks so made by your petitioner, amounting in all to about 800,000, and paid him a higher price than the sum agreed to be paid to him, and which he was ready to accept, viz: the sum of from \$8 to \$8 50 per thousand. That at the time, the said Blaney not only declared said contract to be void, but refused to modify the same or to make any contract with your petitioner, although no breach whatever had been made under said contract, and he was not bound to deliver any bricks prior to the first day of October following, and then but 1,000,000.

Your petitioner appends to this petition a statement of the loss and damages sustained by him in a paper hereto annexed, marked "Exhibit 4."

Your petitioner would further show, that his claim has been presented to Congress, by petition, at different times, and has received the following action thereon, viz:

In the 1st session of the 20th Congress, the petition was referred to the Committee on Claims, who reported that they be discharged, and the petition was laid on the table.

In the 2d session of the same Congress, the petition and papers were referred to the Secretary of War.

At the 1st session of the 21st Congress, the Secretary of War reported on the claim, and his report and the petition having been referred to a committee, they reported adversely on the 31st May, 1830.

During the 1st session of the 22d Congress, the Committee on Claims, on the 30th January, 1832, and in the 1st session of the 23d Congress, the same committee, on the 28th January, 1834, made a similar report.

During the 1st and 2d sessions of the 24th Congress, the petition, &c., were referred to the Committee on Claims, who made no report.

At the 2d session of the 25th Congress, the same committee made an adverse report, on the 27th January, 1838, and a like report (No. 54) at the 1st session of the 26th Congress.

During the 1st session of the 28th Congress, the same committee reported adversely, (No. 557,) and at the 2d session of the 28th Congress, the same committee, to whom the petition was referred, made no report.

At the 1st session of the 29th Congress, additional proofs and arguments having been filed, the Committee on Claims made a favorable report, (Rep. No. 645,) accompanied by a bill (No. 428,) but the claim was not finally acted upon by the two houses.

At the 1st session of the 30th Congress, the same committee made a like report, (Rep. No. 366,) accompanied by a bill, (No. 322,) which was not finally acted on by the House.

At the 1st session of the 31st Congress, the same committee reported favorably, (Report No. 244,) accompanied by a bill, (No. 241,) which was not finally acted on by the House of Representatives. All the foregoing reports were now in the House of Representatives.

At the 1st session of the 33d Congress, the Committee on Claims of the Senate reported favorably on the petition, accompanied by a bill, (Senate bill No. 326.) This bill passed the Senate and was not acted on in the House of Representatives. This was the only action of the Senate on this claim.

Your petitioner would further state, that he is the sole owner of said claim, and that he has not assigned the said claim, or any part of the same, to any person.

Your petitioner prays your honors to inquire into the matters set forth in the foregoing petition, and, on finding the same to be true, to grant such relief as to law and equity shall appertain.

[Exhibit 1.]

List of proposals received by Captain George Blaney, for the delivery of brick at Oak island, agreeably to his advertisement contained in the National Intelligencer, from January, 1826, to March 15, 1826.

Names of proposers.	Place of residence.	Quantity.	Size.	Price per M.
R. H. Clements.....	Alexandria, D. C.....	6,000,000	8½ 4 2½	\$14 50
L. V. Newton.....	New York.....	2,000,000	8 4 2	12 75
J. Seawell.....	Fayetteville, N. C.....	2,000,000	8½ 4½ 2½	8 50
W. H. Sumner.....	Boston, Mass.....	6,000,000	8 4 2	16 00
Williams & Ensign.....	New York.....	6,000,000	8 4 2	13 00
Amos Alexander.....	Alexandria, D. C.....	1,000,000	8½ 4½ 2½	11 00
George Howelth.....	Dresden, Maine.....	6,000,000	8 4 2	14 00
Thomas Crown ^o	Washington City.....	1 to 6,000,000	8 4 2½	7 75
Hiram Jennings.....	Morven P. O., N. C.....		8 4 2	12 00
Benjamin McGinness.....	New York.....	2,000,000	8 4 2	13 50
				13 00
				12 75
Richard Stanton.....	Alexandria, D. C.....	1,000,000	8½ 4½ 2½	11 75
Elijah B. Woolston.....	Mount Holly, N. J.....	2,500,000	8 4 2	15 00
		or 6,000,000	8 4 2	16 66½
George Whitman.....	Baltimore.....	4,000,000	† 8 4 2	7 50
Allanson Webb.....	to freight the above.....	4,000,000	-----	8 00

^o Mr. Crown's proposals are accepted; he makes the bricks within five miles of Oak island.

† To be received by the United States in B.

I certify that the contract entered into between Thomas Crown and myself for the delivery of 3,000,000 of bricks for the fortifications at Oak island was made on the most favorable terms that could be procured.

GEORGE BLANEY,
Captain Corps of Engineers.

ENGINEER DEPARTMENT, Washington, Feb. 1, 1848.

A true copy:

JOSEPH G. TOTTEN,
Colonel and Chief Engineer.

[Exhibit 2.]

Articles of agreement made at Smithville, North Carolina, on the sixteenth day of March, in the year of our Lord one thousand eight hundred and twenty-six, between George Blaney, captain of the United States corps of engineers, superintending the construction of the fortification at Oak island, near the mouth of the Cape Fear river, in the State of North Carolina, of the one part, and Thomas Crown, of Sheperdstown, in the State of Virginia, of the other part.

This agreement witnesseth, that the said George Blaney, for and in behalf of the United States of America, and the said Thomas

Crown, his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree to and with each other as follows, to wit:

1st. That the said Thomas Crown, his heirs, executors or administrators, shall deliver at the United States wharf at Oak island, near the mouth of Cape Fear river, three million bricks in the manner following, to wit:

One million on or before the 1st day of October, 1826, one million on or before the 30th day of November, 1826, and the remaining one million on or before the 31st day of December, 1826.

2d. That the said three million bricks shall be manufactured of such clay as shall be approved by the engineer superintending the fortifications at Oak island, and shall be made in moulds of the standard size adopted by the corporation of the city of Washington; that is to say, the brick when moulded shall measure nine and one-eighth inches in length, four and five-eighth inches in breadth, and two and five-eighth inches in thickness.

3d. That the said three million bricks shall be all hard-burned, and shall be subject, on inspection, to approval or rejection, by an officer of engineers or such person as shall be appointed by the superintending engineer of the fortifications constructing at Oak island, for that purpose.

4th. That the said Thomas Crown, his heirs, executors or administrators, shall be entitled to receive from the United States, through the hands of the said George Blaney, or such other officer of the United States as shall be duly authorized, for the brick delivered by virtue of this contract, the sum of twenty-three thousand two hundred and fifty dollars lawful money of the United States, being at the rate of seven dollars and seventy-five cents for each and every thousand brick.

5th. That the said Thomas Crown, his heirs, executors or administrators, shall be entitled to receive from the United States, in the manner stipulated in the preceding article, on the delivery of any part of the said three million of brick which shall have been inspected and approved by the person designated by the superintending engineer of the fortifications constructing at Oak island, a sum corresponding with the quantity actually delivered, at the rate established in the foregoing stipulation.

In testimony whereof, we have hereunto affixed our hands and seals the day above written.

[L. s.]

GEORGE BLANEY,
Captain Engineers.

[L. s.]

THOMAS CROWN.

Signed, sealed, and delivered in presence of—

JOHN H. HOLMES,
JOHN BROWN.

It is understood that the United States are to furnish hands to receive the brick as they shall be tossed or thrown from the vessel by the contractor.

GEORGE BLANEY,
Captain Engineers.

[Exhibit 3.]

ENGINEER DEPARTMENT,
Washington, July 26, 1826.

SIR: Your project of operations, dated the 1st instant, has been examined and is approved.

The copy of the contract with Mr. Crown for the supply of 3,000,000 of bricks, which has been sent to the department, is decidedly objectionable. There is no penalty expressed, and no bond accompanying and referring to it. The obligation to deliver the quantity stipulated for, of the quality and at the price specified, is nugatory so far as it is capable of enforcing performance. If the whole should not be delivered the government is bound, nevertheless, to pay the sum to which it would amount if delivered—at least, according to the letter of the contract, that construction might be put upon it. If it was not intended to take a bond for the faithful performance of the stipulations of the contract, a penalty for failure should have been specified, or a stipulation introduced for reserving a portion of the avails of the deliveries in the hands of the government, and authorizing its forfeiture in the event of failure. The aid the government stipulates to furnish in the reception of the bricks is too indefinitely stated. If it is intended that one hand should be furnished to receive on the shore for each gang employed in the transit of the bricks from the vessel to the shore, it should be distinctly specified.

The contract as it is being a nullity, it will be necessary to modify it to make it binding, or perhaps it would be better to make a new one.

I have, &c.,

By order :

J. L. SMITH,
Captain Corps Engineers.

Capt. GEORGE BLANEY, Corps of Eng., Smithville, N. C.

[Exhibit 4.]

The UNITED STATES,

To THOMAS CROWN.....DR.

1826, July. For amount of bricks manufactured for the United States for delivery at Oak island, North Carolina, as per contract with Captain Blaney, say 800,000 at \$7 75 per 1000.....	\$6,200 00	
Less expense of transporting to Oak island, at 75 cts. per 1,000	600 00	
		\$5,600 00
For sheds, kiln walls, moulds, wheelbarrows, shovels, spades, and other fixtures and tools, and from 300 to 400 cords of wood, &c., &c.....		3,000 00
For loss of profits on 2,200,000 bricks under the contract.....		4,000 00
		12,600 00

CR.		
1826, July.	By amount received of Potter...	\$640 00
	By ^{800,000} \$2,500, being amount agreed to be paid to Potter for the use of his negroes, wood standing in the forest, clay, &c., &c., 800,000.....	666 67
	By amount received from Cap- tain Blaney for 5,000 bricks received by him under the contract.....	38 75
		\$1,345 42
		11,254 58

THOMAS CROWN
against
THE UNITED STATES. } In the Court of Claims.

The deposition of Daniel Hepburn, a witness on the part of the claimant.

Interrogatories by the claimant, and deponent's answers.

1st Int. What is your name?

Answer. Daniel Hepburn.

2d Int. What is your occupation?

Answer. That of a bricklayer and brick mason.

3d Int. What is your age?

Answer. Fifty-five.

4th Int. Where have you resided during the past year?

Answer. In the city of Washington.

5th Int. Have you any interest, direct or indirect, in the claim which is the subject of this inquiry?

Answer. I have none.

6th Int. Are you in any degree related to the claimant?

Answer. In none whatever.

7th Int. Where did you reside in the year 1827?

Answer. I resided in Washington city, but was temporarily at Oak island, Cape Fear river, North Carolina, during January of that year.

8th Int. In what business were you then and there engaged?

Answer. I was engaged then and there as a journeyman bricklayer.

9th Int. Did you see or work upon any bricks which were manufactured by Thomas Crown, the claimant, for the fortification then in progress of erection on Oak island?

Answer. I did work upon brick which, as I was informed by the proper officers in charge of the said work, were made by the said Thomas Crown?

[Memorandum. The solicitor for the United States here objects to so much of the above answer as is hearsay evidence.]

10th Int. By what standard of measurement were said bricks made?

Answer. By the Washington city standard.

11th Int. What was the quality of the said bricks?

Answer. The quality of said bricks was entirely merchantable, as much so as bricks usually are.

12th Int. What was the condition of the brick-kilns in the vicinity of the said fortification during the winter of 1826-'27?

Answer. They were in a dilapidated state.

13th Int. Do you know of any other matter or thing relative to the claim in question?

Answer. I do not.

True copy of the interrogatories and answers, in the above case.

JOHN S. TYSON,
Commissioner.

The deposition of David Hepburn, a witness on the part of the claimant.

Interrogatories by the claimant, and deponent's answers.

1st Int. What is your name?

Answer. David Hepburn.

2d Int. What is your occupation?

Answer. That of a bricklayer and brickmaker.

3d Int. What is your age?

Answer. Fifty-five.

4th Int. Where have you resided during the past year?

Answer. In the city of Washington.

5th Int. Have you any interest, direct or indirect, in the claim which is the subject of this inquiry?

Answer. I have none.

6th Inter. Are you in any degree related to the claimant?

Answer. In none whatever.

7th Int. Where did you reside in the year eighteen hundred and twenty-seven?

Answer. I resided in Washington city, but was temporarily at Oak island, Cape Fear river, North Carolina, during January of that year.

8th Int. In what business were you then and there engaged?

Answer. I was engaged then and there as a journeyman bricklayer.

9th Int. Did you see or work upon any bricks which were manufactured by Thomas Crown, the claimant, for the fortification then in the course of erection on Oak island?

Answer. I did work upon bricks which, as I was informed by the proper officers in charge of the said work, were made by the said Thomas Crown.

[Memorandum. The solicitor for the United States here objects to so much of the above answer as is hearsay evidence.]

10th Int. By what standard of measurement were the said bricks made?

Answer. By the Washington city standard.

11th Int. What was the quality of the said bricks?

Answer. The quality of said bricks was entirely merchantable, as much so as bricks usually are.

12th Int. What was the condition of the brick-kilns in the vicinity of the said fortification during the winter of 1826-'27?

Answer. They were in a dilapidated state.

13th. Int. Do you know of any other matter or thing relative to the claim in question?

Answer. I do not.

DAVID HEPBURN.

DISTRICT OF COLUMBIA, *scd.*

On this eleventh day of October, anno Domini 1855, personally came David Hepburn, the witness within named, and having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of David Hepburn, taken at the request of Thomas Crown to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Thomas Crown. The adverse party was notified, did attend, and did not object.

JOHN S. TYSON,
Commissioner.

Witness 1 day, \$1 50; commissioner's fee, \$1 90.

Further examination of David Hepburn in the above case.

Interrogatories by the claimant.

1st Int. Were there any other brickmaking establishment in the neighborhood of Oak island in 1826 and 1827, except that which the petitioner had established and used?

Answer. I neither knew nor heard of any. In passing to and from Wilmington, N. C., I saw no other.

2d Int. Was there any other building going on in that region to your knowledge, in which the bricks made at that establishment could have been used?

Answer. There was not any, not even a chimney, so far as I know, or have heard.

3d Int. When you saw the brick yard in the winter of 1826-'27, were there any bricks then on the ground? Describe the establishment as you saw it, and state whether it had the appearance of having produced a large number of bricks.

Answer. The brick yard had then the appearance of one in which a large quantity of bricks had been made. The clamps looked as if

they had been stripped, but I could not see how many bricks had been left, but I could see that there were not many.

4th Int. You say you learned from the commanding officer of the fort, that the bricks used in it were made by Crown. Please state who this commanding officer was.

Answer. Captain George Blaney.

5th Int. Were there any other bricks at any other time used in the fort, of the size of the corporation standard of Washington city, except those made by the said Crown?

Answer. There were none others of that standard used in said fort while I was there.

6th Int. Were or were not all the other bricks used in the said fort such as had been brought in vessels from a great distance?

Answer. They were.

7th Int. Do you remember how the bricks said to have been made by said Crown were brought to the fort; whether in open lighters, or in sloops and schooners?

Answer. They were brought in lighters.

8th Int. Was it or was it not notorious that all the bricks made by Crown were used in the said fort, or buildings belonging thereto?

[*Memorandum.* This question objected to by the solicitor of the United States, as asking hearsay evidence.]

Answer. It was a matter of every-day talk among all the workmen, and generally understood to be so.

DAVID HEPBURN.

JOHN S. TYSON,
Commissioner.

True copy :

Further examination of David Hepburn in the above case.

Interrogatories by the claimant.

1st Int. Were there any other brick-making establishments in the neighborhood of Oak island in 1826 and 1827, except that which the petitioner had established and used?

Answer. I neither knew nor heard of any other. In passing to and from Wilmington, N. C., I saw no other.

2d Int. Was there any other building going on in that region to your knowledge, in which the bricks made at that establishment could have been used?

Answer. There was not any, not even a chimney, so far as I know or have heard.

3d Int. When you saw the brick yard in the winter of 1826-'27, were there any bricks then on the ground? Describe the establishment as you saw it, and state whether it had the appearance of having produced a large number of bricks?

Answer. The brick yard had then the appearance of one in which a large quantity of bricks had been made. The clamps looked as if they had been stripped, but I could not say how many bricks were left; but I could see that there were not many.

4th Int. You say you learned from the commanding officer of the fort that the brick used in it were made by Crown; please state who this commanding officer was.

Answer. Captain George Blaney.

5th Int. Were there any other bricks at any time used in the fort, of the size of the corporation standard of Washington city, except those made by the said Crown?

Answer. There were none others of that standard used in said fort while I was there.

6th Int. Were or were not all the other bricks used in the said fort such as had been brought in vessels from a great distance?

Answer. They were.

7th Int. Do you remember how the bricks said to have been made by said Crown were brought to the fort; whether in open lighters, or in sloops and schooners?

Answer. They were brought in lighters.

8th Int. Was it or was it not notorious that all the bricks made by Crown were used in the said fort, or buildings belonging thereto? [This question objected to by solicitor, as asking hearsay evidence.]

Answer. It was a matter of every-day talk among all the workmen, and generally understood to be so.

DAVID HEPBURN.

DISTRICT OF COLUMBIA, *scd.*

On this twenty-eighth day of November, in the year of our Lord eighteen hundred and fifty-five, personally came David Hepburn a second time, having been sworn to tell the truth, the whole truth, and nothing but the truth. The questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of David Hepburn, taken at the request of Thomas Crown, to be used in the investigation of a case against the United States, now pending in the Court of Claims, in the name of Thomas Crown. The adverse party did not attend, but afterwards the said deposition was read by him, and, with the exception of a legal objection to the 8th interrogatory, assented to, he waiving all objections as to want of notice, in the presence of the commissioner.

JOHN S. TYSON,
Commissioner.

Witness 1 day, \$1 50; commissioner's fees, \$1 60.

THOMAS CROWN
against
 THE UNITED STATES. } In the Court of Claims.

The deposition of Robert Brockett, a witness on the part of the claimant.

Interrogatories by the claimant, and deponent's answers.

1st Int. What is your name?

Answer. Robert Brockett.

2d Int. What is your occupation?

Answer. A bricklayer and brickmaker.

3d Int. What is your age?

Answer. Sixty-two.

4th Int. Where has been your place of residence during the past year?

Answer. At Alexandria, in the State of Virginia.

5th Int. Have you any interest, direct or indirect, in the claim which is the subject of inquiry in this case?

Answer. None whatever.

6th Int. Are you in any degree related to the claimant?

Answer. In none whatever.

7th Int. Where did you reside in the fall of eighteen hundred and twenty-six?

Answer. In Alexandria, State of Virginia.

8th Int. What was your business during that time?

Answer. During that period, I carried on bricklaying and brick-making.

9th Int. What was the price of hard-burnt bricks in the fall of eighteen hundred and twenty-six?

Answer. I sold hard burnt-bricks during that time at prices ranging from four dollars and fifty cents to six dollars per thousand. I think that the average price was about five dollars per thousand.

10th Int. In a section of country where wood, clay, and slave labor abounded, at what rate per thousand could three millions of hard-burnt bricks have been furnished, at the period above mentioned?

[Memorandum. The solicitor for the United States objects to this question, because it asks an opinion of the witness.]

Answer. My opinion is that they might be furnished at four dollars per thousand, allowing reasonable distance for the delivery.

11th Int. Do you know of any other matter relative to the claim in question?

Answer. I do not.

ROBERT BROCKETT.

DISTRICT OF COLUMBIA, ss.

On this eleventh day of October, A. D. eighteen hundred and fifty-five, personally came Robert Brockett, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposi-

tion were written down by the commissioner in the presence of the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner.

The deposition of Robert Brockett, taken at the request of Thomas Crown, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Thomas Crown. The adverse party was notified, did attend, and did not object.

JOHN S. TYSON,
Commissioner.

UNITED STATES OF AMERICA, *District of Columbia, sct.*

COURT OF CLAIMS OF THE UNITED STATES.

In a certain cause in which Thomas Crown is petitioner, and the United States defendant, pending in said Court.

The deposition of Robert Brockett.

1st Int. What is your name?

Answer. Robert Brockett.

2d Int. What is your occupation?

Answer. A bricklayer and brickmaker.

3d Int. What is your age?

Answer. Sixty-two.

4th Int. Where has been your place of residence for the past year?

Answer. Alexandria, State of Virginia.

5th Int. Have you any interest, direct or indirect, in the claim which is the subject of inquiry in the above cause?

Answer. None whatever.

6th Int. Are you in any degree related to the claimant?

Answer. In none whatever.

7th Int. Where did you reside in the fall of eighteen hundred and twenty-six?

Answer. In Alexandria.

8th Int. What was your business then?

Answer. I carried on bricklaying and brickmaking at that time.

9th Int. What was the price of hard-burnt bricks in the fall of eighteen hundred and twenty-six?

Answer. I sold hard-burnt bricks at that time from the prices of four dollars and fifty cents to six dollars per thousand. I think the average price was about five dollars per thousand.

10th Int. In a section of country where wood, clay, and slave labor were abundant, for what sum per thousand could three millions of hard-burnt bricks be furnished, at the period above mentioned?

[*Memorandum.* The solicitor for the United States objects to the above question, because it asks an opinion of the witness.]

Answer. My opinion is that they might be furnished at four dollars

per thousand, where there was a reasonable distance for the delivery.

11th Int. Do you know of any other matter relative to the claim in question?

Answer. I do not.

ROBERT BROCKETT.

DISTRICT OF COLUMBIA, ss.

On this eleventh day of October, A. D. 1855, personally came Robert Brockett, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner in the presence of the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Robert Brockett, taken at the request of Thomas Crown, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of Thomas Crown.

The adverse party was notified, did attend, and did not object.

JOHN S. TYSON,
Commissioner.

True copy :

JOHN S. TYSON,
Commissioner.

ENGINEER DEPARTMENT,
February 10, 1846.

In entering into contracts with individuals for the execution of work, delivery of materials, &c., it is customary with this department to retain from the occasional payments made to such contractors a per-centage of the amount due, (usually about twenty per cent.,) which is retained in the hands of the government as a guaranty for the faithful execution and completion of the contract, or to require of such contractors bond, with security, for the faithful execution of their contracts.

Where a per-centage is retained as above, the retained amount is, of course, paid over to the contractor upon the satisfactory completion of his contract.

J. G. TOTTEN,
Colonel and Chief Engineer.

Hon. T. W. LIGON,
House of Representatives.

[Exhibit 1.]

List of proposals received by Captain George Blaney, for the delivery of brick at Oak island, agreeably to his advertisement contained in the National Intelligencer, from January, 1826, to March 15, 1826.

Names of proposers.	Place of residence.	Quantity.	Size.	Price per M.
R. H. Clements.....	Alexandria, D. C.....	6,000,000	8½ 4 2½	\$14 50
L. V. Newton.....	New York.....	2,000,000	8 4 2	12 75
J. Seawell.....	Fayetteville, N. C.....	2,000,000	8½ 4½ 2½	8 50
W. H. Sumner.....	Boston, Mass.....	6,000,000	8 4 2	16 00
Williams & Ensign.....	New York.....	6,000,000	8 4 2	13 00
Amos Alexander.....	Alexandria, D. C.....	1,000,000	8½ 4½ 2½	11 00
George Howelth.....	Dresden, Maine.....	6,000,000	8 4 2	14 00
Thomas Crown.....	Washington city.....	1 to 6,000,000	8 4 2½	7 75
Hiram Jennings.....	Morven P. O., N. C.....	6,000,000	8 4 2	12 00
Benjamin McGinness..	New York.....	2,000,000	8 4 2	13 50
Do.....	do.....	2,000,000	8 4 2	13 00
Do.....	do.....	2,000,000	8 4 2	12 75
Richard Stanton.....	Alexandria, D. C.....	1,000,000	8½ 4½ 2½	11 75
Elijah B. Woolston....	Mount Holly, N. J....	2,500,000	8 4 2	15 00
Do.....	do.....	or 6,000,000	8 4 2	16 66½
George Whitman.....	Baltimore.....	4,000,000	8 4 2½	7 50
Alanson Webb.....	To freight the above	4,000,000	-----	8 00

* Mr. Crown's proposals are accepted. He makes the brick within five miles of Oak island.

† To be received by the United States in Baltimore.

I certify that the contract entered into between Thomas Crown and myself, for the delivery of 3,000,000 bricks for the fortifications at Oak island, was made on the most favorable terms that could be procured.

GEO. BLANEY,
Captain Corps of Engineers.

ENGINEER DEPARTMENT,
Washington, February 1, 1848.

A true copy :

JOS. G. TOTTEN,
Colonel and Chief Engineer.

SMITHVILLE, NORTH CAROLINA,
July 8, 1826.

SIR: I transmit by this day's mail my accounts for disbursing at Oak island during the quarter ending the 30th ultimo, the monthly report and returns for June, quarterly return of property (3), quarterly returns of provisions purchased and issued (5), quarterly estimate (form 9), monthly estimate (10), and project for conducting the operations at Oak island to 31st December, 1826; also, copy of contract made with Mr. Thomas Crown, for the supply of brick.

I have the honor to be, very respectfully, your obedient servant,

GEO. BLANEY,
Captain Corps of Engineers.

Major General MACOMB,
Chief Engineer, &c., &c., &c.

Rep. C. C. 38—2

[Exhibit 3.]

ENGINEER DEPARTMENT,
Washington, July 26, 1826.

SIR: Your project of operations, dated the 1st instant, has been examined, and is approved.

The copy of the contract with Mr. Crown, for the supply of 3,000,000 bricks, which has been sent to this department, is decidedly objectionable. There is no penalty expressed, and no bond accompanying and referring to it. The obligation to deliver the quantity stipulated for, of the quality and at the price specified, is nugatory so far as it is capable of enforcing performance. If the whole should not be delivered, the government is bound, nevertheless, to pay the sum to which it would amount if delivered—at least, according to the letter of the contract, that construction might be put upon it. If it was not intended to take a bond for the faithful performance of the stipulations of the contract, a penalty for failure should have been specified, or a stipulation introduced for reserving a portion of the avails of the deliveries in the hands of the government, and authorizing its forfeiture in the event of failure. The aid the government stipulates to furnish in the reception of the bricks is too indefinitely stated. If it is intended that one hand should be furnished to receive on the shore for each gang employed in the transit of the bricks from the vessel to the shore, it should be distinctly specified.

The contract, as it is, being a nullity, it will be necessary to modify it to make it binding, or perhaps it would be better to make a new one. I have, &c.

By order:

J. L. SMITH,
Captain Corps of Engineers.

Captain GEORGE BLANEY,
Corps of Engineers, Smithville, N. C.

ENGINEER DEPARTMENT,
February 6, 1855.

The preceding are correct copies of a letter from Captain Blaney to the Chief Engineer, dated Smithville, N. C., July 8, 1826, and of a letter from Captain J. L. Smith to Captain Blaney, dated July 26, 1826.

JOS. G. TOTTEN,
Brevet Brig. Gen. and Col. Engineers.

ENGINEER DEPARTMENT,
Washington, March 2, 1846.

SIR: Your communication of the 27th ultimo, making several inquiries in regard to contracts entered into by officers under the control of the Engineer Bureau, and requesting information in the

particular case of a contract with Thomas Crown, has been received, and in reply I have the honor to give the following answers to the questions therein propounded :

1st. Whether contracts made by officers under the control of your bureau must "in *all* cases be approved by the bureau or by the department in order to make them binding upon the United States?"

In all cases of contracts made by officers under the control of this department the contract must be sanctioned by the Chief Engineer, in order that such contract may be binding upon the United States. The words of the existing regulation on the subject are: "No contract will be binding upon the United States or will go into operation until it has been sanctioned by the Chief Engineer."

2d. "Is the case of Thomas Crown an exception to this rule, or was an approval of his contract *indispensable*, under the usages and instructions of the department, to its completion?" "Are all contracts considered *inchoate* until approved?"

The usages and instructions of the Engineer Department have been uniform in this respect since February, 1840, the date of the present regulations, requiring, in all cases, a compliance with the requisitions of said regulations. The regulations in force at the time of Mr. Crown's contract required that when the contracts are made they must be reported to the Engineer Department, "accompanied by a list of the proposals, and a certificate declaring them to have been made on the most reasonable terms that could be procured; and copies of all contracts so made must be forwarded to the Engineer Department."

And it appears, on reference to a letter from this department signed by Capt. J. L. Smith, of July 26, 1826, (a copy of which is found in House Doc. No. 8, 21st Congress, 1st session,) that it was then the usage of the department to disapprove contracts thus transmitted for its examination when they were not deemed to guard sufficiently the interests of the United States. It seems to me the action of the department in pronouncing that contract a "nullity" is unequivocal as to the understanding it had of its own powers over contracts in that condition.

3d. "The committee also desire to know upon what grounds the bureau predicated its rejection of the claim."

It would appear from this interrogatory to be the opinion of the committee that Mr. Crown had, under his contract, addressed a claim to this bureau, which had been rejected. The grounds for such objection being now asked for by the committee, I have caused diligent search to be made through our records up to 1st January, 1830, (a day later than that on which the Secretary of War reported the case back to the House,) without finding any evidence of such claim.

As to the view taken at that day by the Engineer Department of the circumstances of this case, we have found no other evidence or facts than are explained in, or to be inferred from, the printed documents before referred to.

I am, very respectfully, sir, your most obedient,

J. G. TOTTEN,

Col. and Chief Engineer.

Hon. J. WATKINS LIGON,

Committee of Claims, House of Representatives.

ENGINEER DEPARTMENT,
Washington, March 8, 1846.

SIR: Your letter of yesterday, enclosing the contract of Thomas Crown, and making, in behalf of the Committee of Claims, the inquiries whether or not the contract is "drawn up in the same manner or form and stated in the same terms and substance that contracts for similar work under your department are usually drawn," and whether or not the contract "is such as the practice of the department has usually sanctioned," has been this day received.

Upon an examination of Mr. Crown's contract I find it to be deficient in the following particulars, viz:

1st. It contains no certificate by the officer that the contract was entered into on the most favorable terms that could be procured. This certificate was required by the regulations in existence in 1826.

2d. Contracts cannot now be transferred either in whole or in part, and must contain a statement to that effect. This does not appear to have been the case in 1826.

3d. Contracts either contain or must be accompanied by some provision guarantying the full and faithful performance by the contractor of all the stipulations of the contract. This is done either by taking the contractor's bond with security, or by retaining from the periodical payments a certain per-centage of the amount due. This usage seems to have been enforced in 1826, as would appear from an inspection of the contracts of that period, as well as from the correspondence of the Engineer Department in relation to the very contract now under consideration.

4th. Many contracts entered into about the period of 1826, as well as those of the present date, contain a provision stating that the contract is not binding upon the United States until approved by the War Department or by the Chief Engineer; and even though the contract contained no such express provision, still it would not now be considered binding without such approval, nor is it doubted that such approval was in 1826 considered necessary to the validity of contracts.

5th. In every contract there must be inserted an express provision that no member of Congress shall be admitted to any share or part thereof, or to any benefit to arise therefrom. (See act 21st April, 1808, section 3.) This provision of the law appears not to have been enforced about the time that Mr. Crown's contract was prepared. Its non-observance was perhaps owing to the fact that its existence was at that time unknown.

Mr. Crown's contract is returned herewith.

I have the honor to be, very respectfully, your most obedient,

J. G. TOTTEN,
Col. and Chief Engineer.

Hon. T. W. LIGON,
House of Representatives.

ENGINEER DEPARTMENT,
Washington, February 6, 1855.

SIR: Your letter dated the 3d instant was not received here till yesterday, the 5th, after 3 o'clock.

It calls for a "copy of a letter written by Capt. Geo. Blaney to the Engineer Department, enclosing (for approval) a contract made by him with Thomas Crown; also a copy of a letter in reply to the former, by Capt. John L. Smith, returning the contract to Capt. Blaney unapproved." And I have the honor to transmit the copies asked for, herewith.

You refer, in your letter above acknowledged, to a "former letter which remains unanswered;" but no such letter has been received at this office. Mr. Crown inquired here about such a letter, some days since; but there was no trace of any such letter to be discovered in the office. Since those inquiries of Mr. Crown, a person delivered to me an unsigned letter that may have been written by you; (indeed, I have now no doubt that it was;) but, as it called for important papers, you will not be surprised that I told the person he must take it back for signature. I saw no more of it.

The copies now transmitted are—

1. Letter from Captain Geo. Blaney, dated Smithville, N. C., 8th July, 1826, to Major General Macomb, Chief Engineer, &c.

2. Letter from Captain John L. Smith, dated Engineer Department, Washington, July 26, 1826, to Captain Geo. Blaney, at Smithville, N. C.

I have the honor to be, very respectfully, your obedient servant,
JOS. G. TOTTEN,

Brevet Brigadier General, and Chief Engineer.

HON. A. P. EDGERTON,
Chairman Committee of Claims, House of Representatives.

[Exhibit 2.]

Articles of agreement made at Smithville, North Carolina, on the sixteenth day of March, in the year of our Lord one thousand eight hundred and twenty-six, between George Blaney, Captain of the United States Corps of Engineers, superintending the construction of the fortification at Oak island, near the mouth of the Cape Fear river, in the State of North Carolina, of the one part, and Thomas Crown, of Sheperdstown, in the State of Virginia, of the other part.

This agreement witnesseth, that the said George Blaney, for and in behalf of the United States of America, and the said Thomas Crown, his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows, to wit:

1st. That the said Thomas Crown, his heirs, executors or administrators, shall deliver at the United States wharf at Oak island, near

the mouth of Cape Fear river, three million bricks, in manner following, to wit :

One million on or before the first day of October, 1826 ; one million on or before the thirtieth day of November, 1826 ; and the remaining one million on or before the thirty-first day of December, 1826.

2d. That the said three million bricks shall be manufactured of such clay as shall be approved by the engineer superintending the fortifications at Oak island, and shall be made in moulds of the standard size, adopted by the corporation of the city of Washington ; that is to say, the brick when moulded shall measure nine and one-eighth inches in length, four and five-eighth inches in breadth, and two and five-eighth inches in thickness.

3d. That the said three million brick shall be all hard-burned, and shall be subject, on inspection, to approval or rejection by an officer of engineers, or such person as shall be appointed by the superintending engineer of the fortifications constructing at Oak island, for that purpose.

4th. That the said Thomas Crown, his heirs, executor or administrators, shall be entitled to receive from the United States, through the hands of the said George Blaney, or such other officer of the United States as shall be duly authorized, for the brick delivered by virtue of this contract, the sum of twenty-three thousand two hundred and fifty dollars lawful money of the United States, being at the rate of seven dollars and seventy-five cents for each and every thousand brick.

5th. That the said Thomas Crown, his heirs, executors, or administrators, shall be entitled to receive from the United States in the manner stipulated in the preceding article, on the delivery of any part of the said three million of brick which shall have been inspected and approved by the person designated by the superintending engineer of the fortifications constructing at Oak island, a sum corresponding with the quantity actually delivered at the rate established in the foregoing stipulation.

In testimony whereof, we have hereunto affixed our hands and seals the day above written.

GEO. BLANEY, [L. s.]

Captain Engineers.

THOMAS CROWN. [L. s.]

Signed, sealed, and delivered in the presence of

JOHN H. HOLMES,

JOHN BROWN.

It is understood that the United States are to furnish hands to receive the brick as they shall be tossed or thrown from the vessel by the contractor.

GEO. BLANEY,

Captain Engineers.

To the honorable the Senate and House of Representatives of the United States in Congress assembled :

The petition of Thomas Crown, of the State of Maryland, respectfully sheweth : That in the month of February, in the year 1826, a certain George Blaney, captain in the corps of engineers, issued proposals for a supply of several millions of bricks, to be delivered at Oak island, in North Carolina, for the use of the United States.

That divers bids were made by various persons ; but that of your memorialist being the lowest, was accepted by said Blaney, and of this fact said Blaney gave notice to your memorialist on the next day, to wit : on the 16th day of March, 1826. (See copy of advertisement and letter of acceptance, Nos. 1 and 2.)

That pursuant to preliminary proposals made and accepted, a contract was entered into between said Blaney and your memorialist, and *solemnly executed*. (See contract in accompanying papers.)

That your memorialist forthwith repaired to Smithville, near Oak island, with moulders, brick-burners, laborers, and all the necessary implements of his trade ; and in accordance with the stipulations of the contract, your memorialist diligently proceeded to make the number of bricks which, according to said contract, he was to deliver on or before the 1st day of October, 1826, viz : one million ; and that your memorialist manufactured and had ready for delivery, as early as the 1st of July, eight hundred thousand bricks, five thousand of which number said Blaney, on the 28th day of June, actually received under the contract. (See Exhibit No. 4.)

That on or about the 1st of August, 1826, Capt. Blaney received from the Engineer department a letter objecting to the terms of the contract entered into between him and your memorialist. (See Ho. Doc. No. 8, p. 5.)

Your memorialist avers that from this time the said Blaney, in order to screen himself from these *supposed* defects in his contract, and becoming alarmed at the objections made to it by the department, commenced a system of wrong and oppression towards your memorialist, the evident object of which was to force your memorialist to abandon his contract. That the said Blaney, notwithstanding the repeated offers and entreaties of your memorialist, *refused to receive* the bricks which were ready for delivery, thereby expressly *violating the 5th article of agreement in the contract*. That the said Blaney also positively refused to modify the contract or execute another that might suit him better, but insisted that your memorialist should take as a partner one Samuel Potter, or sell out his interest under the contract to him. The frequent entreaties of your memorialist, that the said Blaney would perform his part of the contract and receive the bricks then ready for delivery, were in vain ; and at length your memorialist, borne down by the many and sudden embarrassments brought upon him by the *combined efforts* of said Blaney and Potter, was reluctantly and unavoidably *forced* to sell out to said Potter at an immense sacrifice, and abandon the contract, the terms of which the said Blaney had *first* so flagrantly violated.

Your memorialist respectfully refers your honorable body to the

accompanying papers, and particularly to the certificates, therein contained, from the most respectable and intelligent persons and disinterested witnesses, placing beyond dispute the fact that your memorialist possessed *ability* and *industry* as an artisan, and honesty and integrity as a man—a fact, in itself, convincing to any upright mind that your memorialist would have performed his part of the contract with credit to himself and advantage to the government, had he not been driven from his undertaking, and compelled to abandon the contract by the oppression of the said Blaney, and by his open violation of its terms.

In conclusion, your memorialist prays that your honorable body will grant relief for the actual loss and damage by him sustained; and your memorialist is certain that he falls considerably below his actual loss and damages, which he estimates at \$6,000.

Your memorialist feels confident, relying implicitly, as he does, upon the wisdom and justice of your honorable body, that he will speedily obtain the relief for which he prays.

THOMAS CROWN.

WASHINGTON, *December 16, 1845.*

BALTIMORE, MD., *January 15, 1836.*

On this 15th day of January, 1846, personally appeared before me, a justice of the peace, Thomas Crown, and being duly sworn on the Holy Evangely of Almighty God, depose and saith:

That by the breach of contract by Captain Blaney, of the United States engineer corps, he has sustained damages considerably above \$6,000.

This deponent further states, that the said Blaney positively and frequently refused the bricks that were ready for delivery, and *threatened him with personal violence* if he did not resign his interest under said contract to one Potter. The said Blaney, by such oppressive conduct, forced him (this deponent) to abandon his contract.

This deponent again states, and under the solemnity of his oath, that by this breach of the contract between him and said Blaney, he sustained, without doubt, the above-mentioned damages, and has suffered from the effects of such loss ever since.

And this deponent further states, that this was alone his *actual loss*, and does not include the *incidental* and *consequent* loss necessarily attendant upon his loss of time, &c., &c.

T. HEMPSON BETS.

WASHINGTON, *January 4, 1836.*

I do hereby certify, that in the month of February, 1826, I saw an advertisement in the public papers to receive proposals for furnishing 6,000,000 bricks for the fortifications at Oak island, North Carolina. I immediately went on and examined the situation, where

the bricks could be made, &c., and left my offer with said Blaney for furnishing the 3,000,000 bricks. The time specified for the proposals to close was on the 15th day of March, 1826. On or about the 20th of the same month I received said Blaney's letter, accepting my proposal for furnishing the 3,000,000 bricks above mentioned. Said Blaney being a captain in the corps of engineers of the United States, I placed full confidence in his honor and integrity—said Blaney being and acting as agent of the United States. I proceeded on the last of March or the 1st of April to Baltimore, where I placed on board of a vessel, hands, provisions, tools, &c., consigned to Smithville, North Carolina, and think the day after I took passage by land to Smithville. I met Captain Blaney at Taitville, North Carolina, and he informed me that he was going to Philadelphia, and said he would wish me to proceed with my brick-making as rapidly as possible. He also stated that we would have a contract drawn on his return. Captain Blaney did not return till some time in June, when, I think about the first of July, we executed a contract, and it was sent to the Engineer Department. I had then about 1000,000 bricks made and burned for the fortifications at Oak island. The contract was returned again from the Engineer Department to Captain Blaney, and he informed me that the contract was disapproved of, and therefore he would not receive the bricks under the contract, or any other contract. I again and again made application to him to receive the bricks above mentioned: he declared that he would not receive any of them, but stated to me that I had better sell them to a Mr. Potter; but I objected to doing so time after time, and still pressed said Blaney to receive the bricks. At length necessity compelled me to sell them to Potter, at a great sacrifice, as can be seen by the petition, as I was without funds and in a strange country. I had to make a sacrifice of them and return home. My clear loss in that case was not short of \$3,000, say nothing about my time; but notwithstanding, it has been an advantage to the government; for my contract price was \$7 75 per thousand, when the average price of proposals was about \$12 50 per thousand. And in consequence of my going to that country and finding clay and opening yards, to the government it was a saving of several thousand dollars, as I was the only one that went to that country; but who had those advantages of my labors I cannot say: it was either the officer or government—perhaps it was both.

THOMAS CROWN.

DISTRICT OF COLUMBIA, }
Washington County. } ss.

On this 5th day of January, 1836, personally appears before the subscriber, a justice of the peace in and for said county, Thomas Crown, and makes oath in due form of law, that the matters and things set forth in the foregoing statement are true to the best of his knowledge and belief.

Subscribed and sworn to before me,

CLEMENT T. COOTE,
Justice of the Peace.

STATE OF MARYLAND, }
 City of Baltimore, } to wit:

Be it remembered that on this twenty-ninth day of January, eighteen hundred and forty-six, before me, the subscriber, one of the justices of the peace of the State of Maryland, in and for the said city, personally appeared Thomas Crown, and made oath on the Holy Evangely of Almighty God, that by the violation of his contract by Captain George Blaney, and by the said Blaney's cruel oppression, he was forced to sell out to one Potter eight hundred thousand brick, made under said contract, at a ruinous sacrifice, to wit, for the sum of six hundred dollars, together with yards, tools, and outfit of his establishment. This deponent further saith that Captain Blaney took from his pocket the said six hundred hundred dollars and handed to the said Potter, which the said Potter then paid over to this deponent. As there were some small debts pressing on me at that time, I was compelled, for my own protection, to dispose of the said brick-yard, &c., at the price above stated. Further this deponent saith not.

Sworn before

J. L. MAGUIRE.

To the Committee of Claims :

Your honors will readily see the situation of this transaction between myself and Captain George Blaney, of the corps of engineers of the United States: First, in my asking a small compensation for my labor; and secondly, his denying me that which I was justly entitled to, not only by the laws of the land, but by the laws of God; but I have reason to believe that he discovered that he had committed an error, and that he could not repair it only at my loss. Holding an office under the government as captain of engineers was of more value to him than the small amount that I claim would be to me, say nothing about his reputation in the final settlement of this matter, as he is gone and cannot answer for himself. I met with Lieutenant Tuttle about three years ago, who was stationed under Captain Blaney in 1826, and I asked him what he would have done if he had been the commanding officer at that post, in the place of Captain Blaney. His answer was, I should have taken the brick and have paid you for them according to contract, as I did the contractor that furnished me brick for the work at Petticokeal. I think he said I did intend to take his deposition, but he requested me not to do so, as he and Captain Blaney were not on very good terms, and he said that I should be able to get on to settle my business without taking his deposition; but he is also dead.

THOMAS CROWN.

WASHINGTON, *January 15, 1856.*

N. B.—You will discover the evidence furnished by Captain Blaney is a letter from Samuel Potter, the man who purchased the brick from me, who was deeply interested; the next is a letter from John Holmes, who was a settler at Fort Johnson, under the control of Captain Blaney; therefore I hope you will weigh it at its value.

T. C.

WASHINGTON, *March 8, 1827.*

SIR: Having seen your letter to General Macomb, of November 16, 1826, and having duly considered the same, and having been employed by you as your foreman, brick-maker and burner, enabled me to become perfectly acquainted with such parts of the said communication as would naturally come under my cognizance. The amount of brick tendered to Captain Blaney in the first instance was about four hundred and fifty thousand hard-burned brick, which Captain Blaney then refused to receive, and did not receive except about five thousand only. These measures caused excessive embarrassment to Mr. Crown, and compelled him, as he did, to sell out his bricks to Samuel Potter, who was then permitted by the said Blaney to fulfil my contract; and the said Blaney did purchase of said Potter the same brick which he had before refused to receive of Crown, and allowed one dollar per thousand more than Crown's contract price; but worst of all was, that in furnishing the residue of the bricks for the public works, Captain Blaney, Potter stated to me, (and which I observed, being said Potter's foreman at this time,) supposed him to reduce the size of the bricks, to the great injury and injustice of the government. The very bricks refused to be received by Captain Blaney were allowed by the workmen to be the best brick ever delivered at the works. I am of opinion Mr. Crown's brick were as well worth ten dollars, as Potter's were worth eight dollars per thousand.

Blaney and wife boarded with Potter, and they were hand and glove companions; and the whole course pursued by Blaney and Potter in imposing on Mr. Crown, was cruel and oppressive, and fraudulent. At one particular instance, Blaney and Potter came to the yard together, when Potter threatened Crown, in the presence of the hands, that in case said Crown did not permit him to be interested in his contract, he would send him off forcibly by his negroes. So it was, such embarrassments were thrown in his way that he was compelled, ultimately, to sell out his bricks to Potter, and quit the works.

JAMES HENRY.

THOMAS CROWN,
Washington City.

To the honorable the Senate and House of Representatives of the United States:

The petition of Thomas Crown, of the city of Washington, respectfully sheweth:

That in February, 1826, a certain George Blaney, captain in corps of engineers, issued proposals for a supply of several millions of brick at Oak island, in North Carolina, for the use of the United States. That divers bids were made; but that of your memorialist being the lowest, was accepted by said Blaney, and of this fact said Blaney gave notice to your memorialist the next day, to wit: on the 16th day of March, 1826. (See copy of advertisement and letter of acceptance, Nos. 1 and 2.)

Your memorialist forthwith repaired to Smithville, near Oak island, with moulders, kiln-burners, laborers and implements, at request of said Blaney, who was then going to the north, and commenced his operations under his letter of acceptance, and without bond, contract, or security being demanded of him. After said Blaney's return, which was about the last of June, and after memorialist had expended large sums of money, and made great progress in his work, a contract was entered into with said Blaney, a duplicate whereof was given to memorialist, and which said Blaney having got into his possession, destroyed, and cannot now produce it. Memorialist admits that there was conversation and promises about security, but denies that it was originally advertised, or demanded, before he repaired to Smithville, or considered indispensable, by Captain Blaney, else your memorialist would not have been permitted to go on as far as he did in completion of his contract.

In this conclusion, memorialist is justified by the letter of 26th July, 1826, from the Engineer office, to Captain Blaney; showing that Blaney in sending on the contract intended to let it stand on its own stipulations and reservations, and could not have advertised the department concerning a bond and security to be given; else said letter would not contain the expressions which it does.

Captain Blaney's letter was dated the 1st of July, previous to which time, or about it, your memorialist had made about 800,000 brick, as per letter of Blaney, dated 9th August, 1826, of which said Blaney admits 250,000 could be received. Why they were not received, unless Captain Blaney was determined to screen himself by the ruin of memorialist, it is impossible to conceive. Perhaps it may be in part accounted for from the intimacy existing between him and others, who profited by the pressure on your memorialist.

Your memorialist further avers that Captain Blaney received, *under the contract*, 5,000 brick, as per certificate of Peter Hagner, on the 28th June. (See Exhibit No. 4.)

Said Captain Blaney omits in his letter of the 1st of July to complain of "want of means" in your memorialist; and yet he seizes on that condition of your memorialist between that time and his justificatory letter of 9th August, which had been produced by his refusal to accept the 250,000 brick, which would have paid near two thousand dollars to your memorialist, and have redeemed him from the oppressive condition which compelled him, among strangers, to sacrifice the whole.

Will your honorable bodies take the declaration of Captain Blaney, that your memorialist had "more confidence in his own judgment and knowledge of brick-making than subsequent events showed he ought to have had," as correct, against the numerous certificates of persons better qualified than he was to judge? Your memorialist trusts not, but that it will be viewed as another of the excuses for the broken faith and engagements of the representative of the United States.

Your memorialist further avers that most of the brick which he had made, were afterwards received by said Blaney; and if so received, were good brick, inasmuch as the whole number of salmon brick received from Potter, to whom the same were sold by your memorialist, was

only 26,960, as per said certificate of Peter Hagner. See also affidavits of Alfred Emerson, David Hepburn, and James M. Henry, from which it further appears that said Potter, *in the presence of Captain Blaney*, told memorialist if he would not consent to take him, Potter, into partnership, he would use violence to his person. And in the affidavit of Henry, who continued to work for Potter, he states that all the brick sold by memorialist to Potter were received by Captain Blaney at from \$7 50 to \$8 per thousand; and that there were from eight hundred thousand to a million made. The last remark to be made on Captain Blaney's letter of 9th August is, that after having charged your memorialist with "want of means," he says, "had his mental capacity been within a degree proportionate with what he could have accomplished with his means, he must have succeeded." First, he charges want of means, then want of capacity, and lastly contradicts his first assertion.

Your memorialist, in conclusion, avers that from the course pursued by Captain Blaney, he was induced to accept and enter upon this contract; that he proceeded with due diligence towards the completion of the same, and from the conduct of said Blaney, in not receiving the brick admitted by him to be so made, and a small part thereof received, your memorialist was compelled to sacrifice his brick-yards, implements and brick, for six hundred and forty dollars.

Your memorialist, therefore, claims for damages as follows:

Take one-half of what Capt. Blaney says were burned, viz: 800,000, as good—equal to 400,000 at \$7 75, making.....	\$3,100 00
Deduct for sale to Potter.....	\$640 00
5,000 brick delivered.....	38 75
Cost of making — M. brick, at 75 cts. per M.	295 00 973 75

Due memorialist in damages, exclusive of the loss on his brick-yard and wood and implements.....	2,126 25
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Trusting the whole to the justice of Congress, your memorialist, as in duty bound, will ever pray, &c.

THOMAS CROWN.

Having been called on by Mr. Thomas Crown, after charging my memory with what occurred at Oak island, North Carolina, between Mr. T. Crown and Captain George Blaney, in the year 1826, I think some time in the month of August I fell in company at Capt. Blaney's office or at the door, and I heard Mr. Crown state to Capt. Blaney that he would wish him to enter into a new contract or receive his brick that said Crown had made under the contract, and Capt. G. Blaney stated that the contract had been returned, not having been met with security, or something to that amount; but he, Capt. Blaney, alleged that Crown had better sell them to Samuel Potter, as he had means sufficient to buy them, or may be it might be better for Crown to take Potter into partnership with him; but he, Blaney, stated that he would not receive them from Crown. I was two or three times at the brick-yard where Crown made the brick, and he

certainly had gone to a great deal of expense of erecting yards, kilns, and sheds, &c., and I should think he had made and burnt from seven to eight hundred thousand brick, which, I understood, he sold to Potter for a very reduced price. What it was I do not know, but was informed that his losses must have been not short of from three to four thousand dollars. I afterwards assisted in working the same brick in the fort, and found them as good if not better than any other brick received in the fort; but there was strong suspicion that Blaney was concerned with Potter in that transaction; but, to my own knowledge, Crown pressed hard on Blaney to receive his brick and enter into a new contract, as Crown informed him that he was deficient of means to proceed further, and it would be a ruinous thing to the said Crown. I recollect well that Blaney told Crown that his papers and vouchers had been sent back from Washington, and he would make no more contracts, but purchase them from whom he pleased. There is one other circumstance, of a number of blacks being hired from their masters in the country to work as laborers in the fort, and drew their rations and received a high price; and it was said also that Capt. Blaney received part of the profits, from certain circumstances that occurred. I do believe it to be the fact, for he got rich fast.

Z. H. HAWKINS.

The foregoing certificate was sworn to before me this 10th of March, 1836.

THOMAS WILLIAMSON,
Ald. Bo. of Norfolk.

DISTRICT OF COLUMBIA, }
Washington County. } ss.

Appears before me, a justice of the peace in and for this county, David Hepburn, a competent witness, and makes oath on the Holy Evangely of Almighty God, that he was employed by Captain George Blaney, from fortress Monroe, to go to North Carolina, in the month of November, 1826, to work at his trade as bricklayer on a fort at Oak island, in the said State, under the direction of the said Captain George Blaney; and that he did work into said fort bricks which he found there, and was informed were made by Thomas Crown; and the said bricks were in size about the same as those made in the city of Washington.

Given under my hand and seal this 31st January, 1828.

JOHN CHALMERS. [L. s.]

SMITHVILLE, *March 22, 1830.*

Having been called upon by Captain George Blaney, and requested to state in writing what I recollect of a contract made between him and a Mr. Thomas Crown, and all the circumstances connected therewith, they were, to the best of my knowledge, as follows:

Some time in the winter of 1826 Mr. Crown arrived at Smithville, and made a contract with Captain Blaney to make and deliver a large quantity of bricks the next summer—the quantity not recollected certainly, but perhaps three million or upwards. The said Crown visited my brick-yard, and agreed with me that the bricks should be made there, on such terms as we should think equitable and right, saying that he would return to Washington city, where he had at his command all things necessary for the completion of the contract; and that in April he would return to this place, with all things needful, as above stated. During his absence I employed what hands I had in cutting wood and digging clay, and such other work as was needful to prepare for the season. In the early part of April Captain Blaney left here for the north, and about the same time Mr. Crown arrived, but not, as he had promised, with forty or fifty hands, a year's provisions, &c.

He had only four men and a boy, and a small quantity of provisions, and from good authority I believe not more than one hundred dollars in cash. This circumstance alarmed me; but as Captain Blaney was absent, I would not refuse Mr. Crown the chance of making the bricks at my yard, as, in fact, there was no other place in this vicinity where they could be made at any fair price. I therefore agreed with Mr. Crown to give him up the yard, with all the apparatus thereto belonging, together with the wood I had cut, (five hundred cords,) with the privilege of cutting and burning as much more as would be necessary for three million bricks, for the sum, as well as I can recollect, of \$3,500, and also to hire him my negroes; in pursuance of which charge of the yard, hands were given up to him, the said Crown.

It was in vain that Mr. Crown endeavored to procure the number and description of hands required to carry on the business, and most that he was able to get remained with him but a short time before they became dissatisfied and left him. He commenced burning a kiln of brick of near 100,000, early in the progress of which it appeared to all who witnessed his management that he knew but little about the business he had undertaken, which was fully proved at the opening of the kiln, for out of it he got but 5,000 bricks which would pass inspection. By this time every circumstance seemed to portend an unfavorable issue, and my interest being deeply involved, I waited with great anxiety the return of Captain Blaney, believing that he would immediately avail himself of the circumstance of Crown's not having furnished the security required by the contract, to declare the same null and void; but to my surprise and regret, on Captain Blaney's arrival, (I believe in June,) he still appeared to retain the same confidence in Crown, in consequence of which he was allowed to go on until the latter part of July; previous to which, seeing his success impracticable, I resolved to make him no further advances. His money had been long before exhausted, his stores nearly so, and his credit entirely so, and with his health prostrated and he involved in debt. On which, (as I understood,) he requested of Captain Blaney an advance of money or a release from the contract—the latter of which was preferred by Captain Blaney. It was then impossible that Mr. Crown could pay off his debts unless he could get some money. I

was then in advance, at a fair calculation, from \$500 to \$600. He had by this time burned three kilns more of bricks, which had not yet been opened, but were judged to be but little better than the first; the whole quantity which was then on hand being about 400,000, of which Captain Blaney, in order to get rid of Mr. Crown, promised me that he would take all that he could possibly make do at a small advance on the price which Crown was to have had, if I would advance to Crown \$600, which he said was the least he could do with. I was obliged to do so, for my brick-yard, hands, &c., were, as things then stood, a sinking business to me. I went on to deliver the bricks which Crown had given up to me, and Captain Blaney received near 300,000, of which a large quantity were salmon bricks, and but few, if any, such as Captain Blaney has required of me ever since.

From a reasonable calculation, by the waste of wood, clay, &c., which were prepared for the season's work, and which could not be replaced in time to enable me to repair or to redeem the lost time, together with my negro-hire and advance of money, I consider that I was injured at least \$1,000 by Mr. Crown. The foregoing is, to the best of my memory, a true statement of facts, as clearly as I am able to set them forth.

SAMUEL POTTER.

Mr. YOUNG: Please let Mr. Crown have such of his papers as he may require. Select them for him, and keep a memorandum of such as he takes.

Yours, &c.,

D. RUSSELL.

MAY 18, 1838.

Mr. Crown withdrew the certificate of Commodore J. Rodgers and Charles Gratiot, and the letter of George Bomford to T. Crown, December 23, 1835, and also Wade and Bomford's certificates, January, 1828.

JAMES YOUNG, *C. C. C.*

MAY 18, 1838.

SMITHVILLE, NORTH CAROLINA,
March 20, 1830.

SIR: Your letter of the 11th, requesting information relative to a contract entered into between Mr. Thomas Crown and myself, for the delivery of brick for the fortification under my superintendence at Oak island, has been this moment received.

As the mail leaves here again this evening, it will not be in my power to furnish the information required by you before Thursday next, on which day it shall be forwarded; and I trust it will be of

such a character as will relieve Mr. Crown from all the anticipations of gain which he now has in view.

I am, respectfully, your most obedient servant,

GEORGE BLANEY,

Captain Corps of Engineers.

Hon. RUFUS MCINTIRE,

Of the Committee of Claims, Washington City.

SMITHVILLE, NORTH CAROLINA,

March 23, 1830.

SIR: You having requested that I should commit to writing such information as has come within my knowledge with regard to a contract made by you with Mr. Thomas Crown for the delivery at Oak island of three millions of hard-burned brick, I would state that Mr. Crown arrived here from Virginia some time in February or March, 1826, with the vowed intention of contracting for the delivery of bricks at Oak island, shortly after he made an arrangement with Captain Samuel Potter to hire his brick-yard, together with his hands, the use of wood, and such other articles as should be found necessary in the prosecution of his work. This was a conditional purchase, only to take effect should he procure the contract, which he shortly afterwards succeeded in making. Previous to July he made several attempts at burning, but which amounted to nearly a total loss, owing, as I understood, to a mixture of loam and sand with the clay. About the 1st of July Mr. Crown was taken sick, and continued so for two or three weeks. During his illness he made a proposition to me to take his contract, which I declined doing. He then proposed that I should purchase the bricks on hand at the yard, that he might be enabled to pay off his debts and return home, stating as his reasons for wishing to return, that the brick-yard was unhealthy, that he was very much embarrassed for the want of money to pay off his hired hands, and that Captain Potter and himself could not agree. Before making Crown any offer, I had some conversation with Potter respecting my purchasing; he informed me he held the bricks as security for money due by Crown to him, and that he would not suffer them to be removed until he was made secure. Upon this information I declined purchasing. He shortly after sold, or made some arrangement with Potter, by which he relinquished his contract and returned home.

JOHN H. HOLMES.

Captain GEORGE BLANEY,

United States Corps of Engineers.

Sworn to before me, this 23d March, 1830.

SAMUEL POTTER, *J. P.*

WASHINGTON, *January, 1828.*

Mr. Thomas Crown was employed in the erection of the United States arsenal near Pittsburg, Pennsylvania, as master-bricklayer,
Rep. C. C. 38—3

in the years 1814, 1815, and 1816. He performed nearly all the brick work of that extensive establishment by contract; and the work was executed in a satisfactory manner as respects both its quality and the promptness of performance.

I state these facts from personal knowledge, as I was stationed at that post at the time, and was engaged in the supervision of the work.

W. WADE,
Major U. S. Army.

Having employed Thomas Crown in the execution of several pieces of work, I generally found him to be highly attentive and prompt in the performance of his engagements with me.

G. BOMFORD.

WASHINGTON, *January 30, 1836.*

I have known Mr. Thomas Crown as a brick-maker for several years, and believe him well qualified to manage that business. In 1829 and 1830, he delivered bricks at Fort Monroe, Virginia, which were approved of as bricks of good quality, and suitable for permanent building.

A. B. McLEAN.

We agree with Mr. McLean in respect to the opinion he has given of Mr. Thomas Crown as a brick-maker.

J. RODGERS.
C. GRATIOT.

To whom this may concern:

W. A. BRADLEY.

TREASURY DEPARTMENT,
Third Auditor's Office, January 30, 1828.

SIR: I hand you enclosed the statement of bricks purchased and paid for by Captain Blaney, as appears by his accounts on file in this office, furnished by direction of the Secretary of War.

I am, respectfully, sir, your obedient servant,

PETER HAGNER, *Auditor.*

Mr. THOMAS CROWN,
Washington City.

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Memorandum of bricks delivered by S. Potter, and by Hayne and Potter, according to Mr. Hagner's report, (No. 10 a).

By S. POTTER—		
1826, Dec. 27—	264,689 at \$7 50.....	\$1,985 16
	244,590 at \$8 50.....	2,079 01
	26,960 (<i>salmon or samel</i>) at \$4.....	107 84
30—	16,008 at \$8 50.....	136 07
1827, Feb. 26—	334,879 at \$8 50.....	2,846 47
887,126 bricks.		7,154 55

By HAYNE & POTTER—		
April 15—	59,720 (<i>soft</i>) at \$4	\$238 88
May 30—	455,998 at \$8 50.....	3,875 97
June 30—	109,840 at \$8 50.....	933 64
July 31—	173,500 at \$8 50.....	1,474 75
	25,080 (2d quality) at \$6	150 48
824,138 bricks		6,673 72

Statement of bricks purchased and paid for by Captain George Blaney, at Oak island, as appears by his accounts in this office, for the third and fourth quarters of 1826 and first quarter of 1827, furnished to Thomas Crown by direction of the Secretary of War.

Date.	Number of voucher.	Of whom purchased.	Quantity.	Price per M.	Amount.	Remarks.
1826. July 31	3d quarter. 9	J. Seawell.....	21,068 hard-burned bricks, made at Fayetteville, and delivered at Oak island at	\$8 50	\$179 07	In the certificate of Captain Blaney attached to the account, it is stated that they are of a very superior quality, and are to be applied "to the foundation of the fort at Oak island."
31	10	Samuel Potter.....	378,008 hard-burned bricks, delivered at Oak island from 1st of July to date, at	7 50	2,835 06	The certificate attached to the voucher states that they are to "be applied to the construction of permanent quarters or citadel at Oak island."
June 28	11	Thomas Crown.....	5,000 bricks delivered at Oak island, at	7 75	38 75	To "be applied to the construction of the foundations of fort at Oak island."
Sept. 21	29	Thomas Davis.....	88,000 hard-burned bricks at	8 20	721 60	The certificate states that they "will be applied to the construction of the foundations of fort at Oak island. These bricks were purchased in Charleston, S. C., and contain 121½ cubic inches."
Nov. 30	4th quarter. 4	Dudley & Dickenson....	40,120 bricks delivered at Oak island, from New York, at	10 00	401 20	The certificate states, the "bricks from New York" will be applied to "foundations of caponieres, which are in water."
Oct. 24	7	J. Seawell.....	19,000 hard-burned bricks delivered at Oak island, at	8 50	161 50	The certificate states they "will be applied to the foundations of the citadel at Oak island. These bricks are made in Fayetteville, and are very superior in quality: size 8, 4, 2."

10	J. Seawell.....	24, 000 hard-burned bricks, delivered at Oak Island, from Fayetteville, at	8 50	204 00	The certificate states they "will be applied to the foundations of the caponieres, which are in water. These bricks are of a very superior quality: size 8, 4, 2."
27	Samuel Potter.....	264, 689 bricks at..... 244, 590 bricks at..... 26, 960 salmon bricks at..... 536, 239	7 50 8 50 4 00	1, 985 16 2, 079 01 107 84	The certificate states they "will be applied to the following purposes, viz: The bricks at \$7 50 and \$8 50 to construction of citadel; the salmon bricks to construction of chimneys in temporary quarters. The first quantity of bricks, at \$7 50, measure 64 cubic inches; those at \$8 50 measure 81 inches. The first quantity are a part of the purchase made by Lient. Tuttle, under the authority of the Engineer department."
30	Samuel Potter.....	16, 008 bricks at.....	8 50	136 07	"Will be applied to the construction of the citadel."
1827. Feb. 26	Samuel Potter.....	334, 879 hard bricks, delivered at Oak Island between the 8th of January and the above date, at	8 50	2, 846 77	The certificate states they have "been applied to the construction of caponieres, canette, and citadel at Oak Island."
Jan. 26 March 10	J. Seawell..... J. Seawell.....	26, 000 bricks at..... 25, 000 bricks at.....	8 50 8 50	221 00 212 50	The certificate states that they "have been applied to the construction of the canette and caponiere walls of the fort at Oak Island."
Jan. 27	Thomas Crown.....	286, 000 hard-burned bricks, delivered at Oak Island from Wilmington, between Oct. 20, 1826, and this date, at	8 00	2, 288 00	The certificate states that they have "been applied to the construction of foundation of scarp of canette, and to caponieres of the fortifications constructing at Oak Island."

PETER HAGNER, Third Auditor.

TRASURY DEPARTMENT, THIRD AUDITOR'S OFFICE, January 31, 1828.

DISTRICT OF COLUMBIA, }
Washington County. } ss.

Appears before me, a justice of the peace in and for this county, Alfred Emerson, a competent witness, and makes oath on the Holy Evangely of Almighty God, to the following facts, viz: I was employed by Thomas Crown on the 29th of March, 1826, to go with him to North Carolina as a clerk. I sailed from Baltimore with Captain George L. Rouse, in the sloop Hellen, in charge of the said Thomas Crown's hands, provisions, and tools, and arrived at Smithville on or about the 11th April, 1826, where I met said Crown, and all the hands &c., were landed safe; and the said Thomas Crown went to considerable expense in building houses for his hands to live in, making log paths across the marsh, digging clay, and levelling brick-yards, cutting wood, and erecting a wharf to land bricks, &c.; and then commenced making brick, and made, to the best of my knowledge, about 400,000, which were ready for delivery to the fort at Oak island, and Capt. George Blaney would not receive the said brick, alleging some defect in the contract between the said Crown and Blaney; but what it was I did not learn. The said Crown being in want of money, was obliged to sell the said brick to Samuel Potter at a great loss to him, the said Crown, and the said Potter did afterwards sell the said brick to the said Capt. Blaney. I will further state, that previous to the sale of the brick from Crown to Potter, Potter and Blaney came to the brick-yard, and the said Potter said to said Crown, that if he would not receive him as a partner, he would call the negroes and put him (the said Crown) across the creek; but Crown resisting, created a great disturbance between them.

A. EMERSON.

Sworn to before me, this 24th day of January, 1828.

[L. S.]

JNO. CHALMERS, J. P.

WASHINGTON, December 23, 1835.

SIR: In compliance with your request, I will briefly note my recollection of one or two facts connected with your engagement in 1826 to furnish bricks at Oak island, North Carolina, and I do so more cheerfully in consequence of having been one of the persons who recommended you for the employment.

In my recommendation—which was at the time supported by several persons of the most respectable character—I stated that, independent of your experience in brick-making, you furnished the materials and erected several houses for me; and that in every instance you had fulfilled your engagements promptly, and to my entire satisfaction.

Some time after this recommendation, and after I had been informed of your having obtained a contract, application was made to me, I think either by or through Captain Blaney, to know whether I would become one of your sureties; and to which I answered, that I could not, consistent with a fixed determination; which was, while in office,

to avoid any connexion with public contracts ; but that, under other circumstances, I should not have the slightest objection.

With esteem, sir, your humble servant,

G. BOMFORD.

THOMAS CROWN.

WASHINGTON CITY, *February 1, 1830.*

I hereby certify that I was employed by Thomas Crown, as a brick-moulder, at Smithville, North Carolina, to assist him in moulding bricks for the fortifications at Oak island, in 1826. I am under the impression he had between eight and ten hundred thousand bricks made and burned. I am confident there were not less than two-thirds that were of the best quality of bricks, which were worked in the fortifications ; however, it appears there was a contract made between Captain G. Blaney and Mr. Crown, when, it appears, the contract being sent to the Engineer Department, it was returned without being executed ; from what cause I know not. But so it was ; Captain Blaney would not receive the bricks that Mr. Crown had made, and he (Mr. Crown) could raise no money to continue the work, being a stranger in that country. I had no funds to continue the work. He had hired hands of a Mr. Potter, in that country ; and he also furnished ground for Mr. Crown to make the bricks on, for which Mr. Crown was to compensate him. It also appears, that after Captain Blaney would not receive the bricks, Mr. Potter observed he would purchase them of Mr. Crown at a very reduced price—perhaps at one-fourth of their value ; and if he would not take his offer, he would attach the same to save himself, as there was no persons in that country that were able to purchase them except for government.

Mr. Potter being a wealthy man, and whom Captain Blaney boarded with, I have no doubt but there was an arrangement made between those two gentlemen. It also appears that Mr. Potter was an applicant for the contract previous to Mr. Crown's getting it. I will state one circumstance previous to the latter taking place : That Captain Blaney and Mr. Potter came to Mr. Crown's brick-yards together, and he (Potter) said, in the presence of Captain Blaney, that if said Crown did not consider him as a partner in the business, he would call his negroes together and put him across the creek. There was considerable confusion took place, which had mysterious appearances. At length Mr. Crown, from the repeated proposition of Potter, was obliged to sell out his establishment and brick at a great sacrifice, and returned home. I continued to work with Potter the balance of the season ; and the brick made by T. Crown were purchased from Potter at a price not less than from \$7 50 to \$8 per M., and worked in the fortifications at Oak island, and those were as good brick as I have ever seen in any part of this country. And I am under the impression that Mr. Crown could not have received more than \$2 per M. for the brick under the compulsory means then pressed upon him. I am under the impression that if Captain Blaney had received the brick made by Mr. Crown, he would have completed the contract without the least difficulty.

JAMES H. HENRY.

DISTRICT OF COLUMBIA, }
Washington County. } ss.

Personally appeared before me, the subscriber, a justice of the peace in and for said county, James H. Henry, and made oath on the Holy Evangely of Almighty God that the within statement of facts are just and true as they are stated, and was a witness to all the circumstances, as related in the within; and further this deponent saith not.

Given under my hand and seal this 4th day of February, 1830.

HENRY WERTZ, [L. s.]
Justice of the Peace.

TREASURY DEPARTMENT,
Third Auditor's Office, March 1, 1830.

SIR: At the request of Mr. Crown, and by direction of the Secretary of War, I have the honor to inform you that it further appears from the accounts of Captain George Blaney, the officer disbursing at Oak island, North Carolina, the following payments were made to Samuel Potter and Hayne & Potter, for bricks delivered there between the 10th August, 1826, and 16th August, 1827:

1826, Dec. 27.—Samuel Potter, for 264,689 bricks, at	
\$7 50.....	\$1,985 16
Samuel Potter, for 244,590 bricks, at	
\$8 50.....	2,079 01
Samuel Potter, for 2,960 salmon bricks,	
at \$4.....	107 84
Dec. 30.—Samuel Potter, for 16,008 bricks, at	
\$8 50.....	136 07
1827, Feb. 26.—Samuel Potter, for 334,879 bricks, at	
\$8 50.....	2,846 47
April 18.—Hayne & Potter, for 59,720 soft bricks,	
at \$4.....	238 88
May 30.—Hayne & Potter, for 455,999 hard bricks,	
at \$8 50.....	3,875 97
June 30.—Hayne & Potter, for 109,840 hard bricks,	
at \$8 50	933 64
July 31.—Hayne & Potter, for 173,500 hard bricks,	
at \$8 50.....	1,474 75
Hayne & Potter, for 25,080 hard bricks,	
second quality, at \$6.....	150 48

Respectfully, your obedient servant,

PETER HAGNER, *Auditor.*

Hon. E. WHITTLESEY,
House of Representatives.

SMITHVILLE, NORTH CAROLINA,

July 8, 1826.

SIR: I transmit by this day's mail my accounts for disbursements at Oak island, during the quarter ending the 30th ultimo, the monthly report and return for June, quarterly return of property (3), quarterly return of provisions purchased and issued (5), quarterly estimate form (9), monthly estimate (10,) and project for conducting the operations at Oak island to 31st December, 1826; also copy of contract made with Mr. Thomas Crown for the supply of brick.

I have the honor to be, very respectfully, your obedient servant,

GEORGE BLANEY,
Captain Engineers.

Major General MACOMB,
Chief Engineer, &c., &c., &c.

True copy:

R. H. LEE,
Lieut. and Assistant Engineer.

OAK ISLAND, NORTH CAROLINA,

March 23, 1830.

SIR: In answer to your letter of the 11th instant, I now enclose the original contract entered into between Mr. Thomas Crown and myself for the delivery of three millions of bricks for the fortification under my superintendence at this place, (A.) This is the copy of the contract which was forwarded by me to the Chief Engineer, and which was not sanctioned or approved by him. The letter marked B is a copy of one received from Captain J. L. Smith, who was then the assistant to the Chief Engineer, and contains the objections held by the engineer department to the contract. It is proper to observe in this place, that no penalty was expressed in the contract, because it was intended to send a bond with it, but which was not done, owing to the delay of Mr. Crown to name his bondsmen. About the middle of July, 1826, four months after the contract was entered into, Mr. Crown named as his securities Colonel Bomford and Major Wade, of the United States army, neither of whom, however, had, as I understood from them afterwards, ever given him any authority to do so. It was distinctly understood by Mr. Crown that the contract was not to be considered binding on either party, until security was given by him for its faithful performance.

Having obtained leave of absence for a short period, I met Mr. Crown in Fayetteville either the last of March, or early in the month of April, 1826, on his way from Washington city to Smithville, for the purpose of commencing the brick-making business, and in a conversation which I had with him at that time he stated to me that his means were ample; that he had made an arrangement with the Branch Bank of the United States at Washington to discount his paper, and that he could procure from that institution funds enough to enable him to go on with the contract. I beg leave to refer to the paper marked C, and my answer thereto, marked D. He also stated to me that he had sent by water 50 or 100 laborers, (negroes,) with provisions to

last them at least six months ; when the truth was, that he had four men and one boy only, and not over one month's provisions for the limited force. These facts were made known to me while I was in Philadelphia by Lieutenant Tuttle, of the corps of engineers, who was then my assistant. He declared his belief of Crown's inability to perform his contract for the want of capital to employ the requisite force.

About the 20th of June, 1826, I returned to my station, and soon after visited Crown's brick-yard, to make an inspection of his work, and to satisfy myself of the probability of his being able to manufacture the number of brick which he had contracted to deliver. I found that instead of the brick being manufactured of *pure clay*, as was to have been done, agreeably to the direction given to Crown by myself and Lieutenant Tuttle, he was making them of a mixture of loam, clay and sand ; and that out of one or two kilns, which he had burned, there was nearly a total loss, 5,000 only being of a quality fit to be received. These were received and Crown, was paid for them at the rate stipulated in the contract (E,) though I did not conceive myself to be bound to receive one single brick until security had been given for its faithful performance, and until the contract should be approved by the Chief Engineer.

Crown became much embarrassed in his circumstances, and applied to me for an advance of \$1,000 to \$1,500, which it was not in my power to comply with, as the law prohibited advances on contracts ; and on 31st July or 1st August, 1826, he, without advice or persuasion on my part, came forward and voluntarily relinquished his contract. The letter of Captain Smith, (B,) returning the contract, was written on the 26th July, 1826, and received here on the 5th August, 1826. Crown relinquished the contract on the 1st of August, 1826, *and knew nothing of the objections urged against the contract until I informed him thereof four or five days after its relinquishment.* When Crown came forward and relinquished the contract he stated his reasons for doing so, and to the best of my recollection they were as follows : That he could not get bondsmen, and that he had no means of his own to enable him to pay his hands and such other expenses as were necessary. This explains why another contract was not drawn free from the objections entertained by the Engineer Department to the one which had been entered into.

Relative to the non-reception of Crown's brick, it is not true that I refused to receive the brick which he had made. The number stated in my letter to the Chief Engineer is an error ; 500,000 should have been the number in lieu of 800,000. I did receive 5,000 from him, and that is the whole number which he ever delivered here. I did refuse, however, to advance him the sum that he wanted, and receive the brick at the yard ; and my reason for doing so was, that the contract stipulated that they were to be delivered by Crown at Oak island. If I had consented to have received them at the yard it would have been a breach of contract ; and besides, Mr. Potter, to whom Crown owed a considerable sum for advances made to him, would not let them be removed until Crown gave him security for the sum which he owed him. This is the true reason why Crown did not deliver them.

The day on which Crown gave up the contract, or a day or two after, he called on me and informed me that he had endeavored to sell what brick he had on hand to Mr. John H. Holmes, who was prevented, I understood him to say, from closing the bargain in consequence of Mr. Potter refusing to let the brick be removed from his land until he (Crown) should pay for the advances made to him in money and labor by Potter. He told me that he would try to effect a settlement with Potter, and not long afterwards came into my office with Mr. Potter, and told me that the bricks were disposed of to him, for the purpose of enabling him (Crown) to close all his business previously to his leaving this section of the country. The only difficulty in the final settlement of their accounts was the price, which I was to allow Potter for the brick, as there was a risk in Potter's taking the brick and selling them for the price which Crown was to have received by the contract, viz: \$7 75 per M.

On a full consultation with the parties, in which Lieutenant Tuttle, of the corps of engineers, then my assistant, participated, it was determined to allow Potter \$8 50 per M. for all the good brick. This price was fixed upon, with the full approbation of Mr. Crown, and with a view to his benefit alone, for it enabled him to pay Potter all he owed him, and to receive a sum of money, the amount not known by me, from Potter. Crown expressed his gratitude for the liberality which I had manifested towards him. Out of these brick Potter delivered about 250,000.

Previously to this transaction, nearly a million of small bricks had been purchased of Potter by Lieutenant Tuttle before I came here. These bricks contained 64 cubic inches each, for which \$7 50 per M. was paid, by the express authority of the Chief Engineer. These small brick were made the basis of calculation for establishing the price of those which Crown had sold to Potter, containing 83 cubic inches, and which, at the same rate of the small brick, would have been worth \$9 72.6 per M. Crown himself proposed that I should allow Potter \$9 per M. for them.

The only contract that I have had for the delivery of bricks at Oak island, was the one with Crown. He did not transfer that contract to any person whatever. He gave it up unconditionally, for the reasons before stated. All the brick, except those referred to above, which have been used in the work, have been purchased without a contract, and have varied in price from \$4 to \$10 per M., according to size and quality.

You request me to state what assistance I rendered to Crown. The payment to him for the 5,000 bricks, when it strictly should have been made to Mr. Leckie, of Washington, and to whom I conceived myself to be individually responsible for the amount, (\$38 75,) is one instance. Permitting him to proceed at all with his contract, after he deceived me as to his means of carrying it on, or until the security for its performance was given, is another instance. Also in the settlement of a difficulty between him and Potter, when I inspected the brick-yard, by which Crown was saved the mortification of being

driven off from the brick-yard by Potter, who had called his negroes for that purpose.

I have the honor to be, very respectfully, your most obedient servant,

GEO. BLANEY,
Captain Corps of Engineers.

Hon. RUFUS MCINTIRE,
Of the Committee of Claims, &c., &c.

Sworn to before me,

SAM. POTTER, J. P.

SMITHVILLE, N. C., *March 16, 1826.*

SIR: Your proposal for the delivery of from one to six million of brick for the fortifications to be erected at Oak island, has been examined and is hereby accepted.

In consequence of previous arrangements having been made, three million is the number wanted, provided I can procure stone for the foundations; if that material cannot be procured, four and a half million will be required.

I am, very respectfully, your most obedient servant,

GEO. BLANEY.
Captain Corps of Engineers.

Mr. THOMAS CROWN,
Washington City.

SMITHVILLE, N. C., *March 16, 1826.*

SIR: Your letter of the 2d instant has been received. I will accept and pay the order of Mr. Crown for the sum mentioned, or for any other sum, whenever he shall deliver bricks to the amount of the order.

I am, very respectfully, your most obedient servant,

GEO. BLANEY.

Mr. ROBERT LECKIE,
Washington City.

BRICKS WANTED.

Sealed proposals will be received at Wilmington and Smithville, N. C., until the 15th of March next, for the delivery, at Oak island, near the mouth of the Cape Fear river, of six millions of bricks, as follows:

2,000,000	to be delivered prior to the 1st of July, 1826.
2,000,000	do. do. 1st of October, 1826.
2,000,000	do. do. 1st of December, 1826.

The bricks must be hard-burned, and of the best quality, and it is desirable that they should be of the size of the Philadelphia or New York bricks; the former being $8\frac{1}{2}$, $4\frac{1}{4}$, and $2\frac{1}{4}$, and the latter 8, 4, and 2 inches. Proposals will state which of these two sizes it is intended to deliver. Proposals will be accepted for a part of the above, say 100,000. It must be distinctly understood by those who send proposals, that the contracts will be so made, that the bricks will be liable to rejection if they do not pass the inspection of an officer of engineers, or some other person, who will be appointed for the purpose.

A wharf will be in readiness previously to the 1st of April, where vessels can lie drawing nine feet at low water.

GEO. BLANEY,
Captain Corps of Engineers.

JANUARY 18.

“That Mr. Lyon report a bill referring the claim of Mr. Crown to the Third Auditor, to ascertain the damages that Crown has sustained by reason of said contract, *and settle for it*, provided the amount does not exceed the sum of \$6,000.”

MARCH 31, 1830.

The Committee of Claims, to whom was referred the petition of Thomas Crown, report:

That the petitioner, on the 16th day of March, 1826, entered into a contract with George Blaney, a captain of the United States corps of engineers, to furnish 3,000,000 of bricks for the construction of a fortification on Oak island, near the mouth of Cape Fear river, in the State of North Carolina, which bricks were to be delivered at the United States wharf, on said island—one-third before the first day of October, one-third before the first day of November, and the other third before the first day of December next. The petitioner says that he entered on a fulfilment of his contract, and prepared his brick-yard and obtained laborers at a great expense, and by the 10th day of July had ready for delivery from 400,000 to 450,000 bricks, which he tendered to said Blaney, in compliance with his contract. That, to his surprise and disappointment, said Blaney refused to receive said bricks, on the alleged ground of some informality in the contract. That although he (the petitioner) offered to correct any informality that might be in the contract, said Blaney persisted in refusing to receive said bricks, whereby the bricks were thrown on his hands, and he was compelled to sell out his brick and establishment at a great sacrifice. He asks indemnification for his losses of the United States by this violation of his contract on the part of Capt. Blaney, their agent.

The petitioner, under his contract, on the 28th day of June, delivered 5,000 bricks, for which he was paid.

It appears from the report of the Engineer Department, that a copy of the contract was, by Capt. Blaney, submitted to the department for examination, which was not approved because it did not contain any penalty for a breach of it, nor any bond given for its execution. The letter from the department to Capt. Blaney, giving him notice of the rejection or objections to the contract, is dated July 26, 1826. On the 9th of August following Capt. Blaney wrote to the department that the petitioner was unable to comply with his contract—had given it up; that he had not the means to employ hands sufficient to make the quantity he had contracted to; that what he had made were not good; that when the contract was entered into it was with the express understanding he was to procure good security, and that until that was done the contract was not to be considered binding; and that time had been given him to procure his bond, and that he had failed to do it.

The petitioner adduces three depositions, in one of which Alfred Emerson deposes that he was clerk to the petitioner, and had charge of his hands in preparing yards and making brick; that accommodations were made for the workmen, wood procured, &c., and about 400,000 bricks were made ready for delivery; and that Capt. Blaney would not receive them, alleging some defect in the contract. The petitioner being in want of money, was obliged to sell, at a great loss, to Samuel Potter, and that Potter afterwards sold the same bricks to Blaney; that, previous to the sale of the bricks, Potter and Blaney came to the brick-yard, and Potter told the petitioner if he would not receive him as a partner, he would call the negroes and put him across the creek; but he resisting, created a disturbance.

James H. Henry's deposition is the same in substance, and though it be not signed by a certificate on the back, it appears to be sworn to.

David Hepburn testifies that he was employed by Capt. Blaney as a bricklayer in building the fortification on Oak island, and laid bricks which he found there, which he was informed were made by the petitioner—about the size made in Washington.

The petitioner did not produce the contract, and the committee could not decide whether it was broke or not without knowing precisely the terms of it. One of the members, in behalf of the committee, addressed a letter to Capt. Blaney requesting him to furnish them the contract, and also propounded to him certain questions, especially as to the date of the delivering up of the contract by Crown, as his witnesses and papers were indefinite on that subject. Capt. Blaney has furnished the contract, accompanied with a letter of explanation in answer to the questions propounded to him.

Capt. Blaney denies that the petitioner ever offered to deliver brick which he refused to receive. That the bricks were at the yard, where he could not, under the contract, receive them, as they were to be delivered on the island. That the petitioner had used the brick-yard of Potter, and owed him for the use of the same and for supplies, and that Potter refused to let Crown remove the bricks till he was paid. That he could not advance the petitioner any funds, especially as he

had not furnished the bond he had promised to do. That the petitioner being thus embarrassed, was obliged to give up his contract, which he voluntarily did because he could not fulfil it; and that this was done on the 1st of August, four or five days before he received the letter from the department objecting to the contract, which letter was received on the 5th of August. That the petitioner endeavored to sell his bricks to John H. Holmes, but was prevented by Potter's refusal to let the bricks be removed, and that afterwards he sold to Potter; and that he, (Capt. Blaney,) at the request of the petitioner, agreed to take all the brick that were fit of Mr. Potter at a certain price, to enable him and Potter to close their bargain; and that the petitioner urged Blaney to give even a higher price, as he would get better terms of Potter. Capt. Blaney also furnishes the affidavit of John H. Holmes, which corroborates his statement so far as Holmes was concerned. He also produces Mr. Potter's statement; but that not being under oath, and he not an officer of the government, the committee take no further notice of it.

The committee, confiding in the statement of Capt. Blaney, which appears to be corroborated by dates and circumstances, and not directly contradicted by the petitioner's witnesses further than can be accounted for from their misunderstanding the facts, are of opinion that there has been no breach of the contract on the part of the agents of the government; that it was voluntarily surrendered by the petitioner, and without any improper influence on the part of the agent to induce him to do so; and that this surrender was for his relief, and was permitted for his benefit; and that the United States has most reason to complain that its surrender was accepted.

CITY OF WASHINGTON, *February 3, 1848.*

Mr. Thomas Crown, of Maryland, has called my attention to the certificates of Colonel George Bomford, (No. 8,) and Major William Wade, (No. 11,) appended to a report of the Committee of Claims, made in the 29th Congress, 1st session. I fully concur with Colonel Bomford and Major Wade. During the years 1814, 1815, 1816, and 1817, and long subsequent, I was in command of the United States arsenal near Pittsburgh, Pennsylvania. Major Wade was subordinate, but had supervision of the building operations under my general superintendence. In the daily operations Major Wade was the inspector. All contracts and payments were made by me.

I know of no instance of Mr. Crown's delinquency, unskilfulness, negligence, or want of promptitude; on the contrary, he always manifested great energy, skill, and diligence. In settling for extra work not provided for in the contracts, or for additional allowances, or deductions for alterations of plans, &c., he was always liberal and just.

A. R. WOOLLEY.

IN THE HOUSE OF REPRESENTATIVES—February 2, 1829.

Ordered, That the petition of Thomas Crown be referred to the Secretary of War.

Attest:

M. ST. CLAIR CLARKE,
Clerk House of Representatives.

The Committee of Claims, to whom was referred the petition of Thomas Crown, respectfully report:

That upon an examination of the case, they find the following facts proved and true, viz:

That, on the 18th of January, 1826, George Blaney, a captain of the United States corps of engineers, being duly authorized, advertised for proposals to furnish from 1,000,000 to 6,000,000 bricks, to be delivered at Oak island, near the mouth of Cape Fear river, in the State of North Carolina, to be used in the erection of fortifications at that point.

Proposals were accordingly made by sundry individuals, and among them by the petitioner. The proposals of the petitioner being more than forty per cent. less than those of any other person proposing for the whole quantity, was accepted in due form by said Blaney, on the 11th day of March, 1826, and were duly certified to the Engineer Department, according to the then existing regulations, and assented to. On the same day a contract, under seal, was executed by said Blaney, on behalf of the United States, and the petitioner, pursuant in all respects to the advertisement and proposals, wherein the petitioner covenanted to deliver at said point 3,000,000 bricks, to wit: 1,000,000 on or before the 1st day of October, 1826; 1,000,000 on or before the 30th day of November, 1826; and the remaining 1,000,000 on or before the 31st day of December, 1826; and was to receive therefor at the rate of \$7 75 per thousand for said bricks upon delivery.

Prior to the acceptance of his proposals, Mr. Crown had procured the refusal of one Samuel Potter of his brick yard, and soon after the contract was made, to wit: on the — day of April, commenced the manufacture of brick thereon. It appears that Captain Blaney boarded with Potter, the owner of the yard; that said Potter, as early as June, contemplated a partnership with Crown. Blaney and Potter both urged it, and in the event of his refusal, threatened to turn him off the yard by force. That in June, Blaney received 5,000 bricks, and paid for them; that in July, Crown had about 400,000 ready to be delivered, but that Blaney refused to receive them. That on the — day of July, Blaney forwarded the contract to the Engineer Department, and on the 26th of the same month the contract was returned, with the objections from that department that there was no penalty expressed, and no bond accompanying it, and refused it, and suggesting its modification or the making of a new one.

Mr. Crown at this time had exhausted his funds in the manufacture

of bricks, which Blaney refused to receive, alleging the imperfection of the bricks first, and then the nullity of the contract. He had become indebted to Potter about \$600 for use of the yard and other advances, and Potter refused to permit a sale to any one else, and was obliged to sell all his improvements and brick on hand to Potter for his indebtedness, \$600, and \$600 in cash, making \$1,200 in all. It appears from the report of Blaney to the Engineer Department.

I hereby certify that in the months of February and March, 1826, I saw advertisements in the papers requesting proposals to furnish stone and brick at Oak island, North Carolina, and, on seeing the above advertisements, I went on there to see what facilities there would be for discharging of vessels before I put in my proposals; and as soon as I made my surveys of the harbor, I then handed to Capt. George Blaney himself my proposals to furnish the brick and stone—one proposing for brick, and the other for stone—in two letters, and both directed according to advertisement. I remained there, and on the 15th of March the letters were all opened; and on the 16th, he, Capt. George Blaney, informed me, by showing me the offers of the whole, that I was under-bid in the brick proposal, and was the lowest bidder for stone by \$150 per perch, and there were many bidders for stone. I brought the original letters from Smithville for Capt. Blaney, and put them in the post office at Wilmington; and Capt. Blaney told me, when he handed me the letters, that my name with all the other bidders were scaled in those letters, and I always supposed they were, until some time in February last, when I called on the department and had the letter for the stone contract read, which astonished me to find it quite opposite to what I expected.

R. H. CLEMENTS.

Mr. T. CROWN,
Washington, April 27, 1836.

Sworn and subscribed before me, one of the justices of the peace for Washington county, District of Columbia, this 28th day of April, 1836.

B. K. MORSELL, J. P.

The Committee of Claims, to whom was referred the claim of Thomas Crown, report:

That this claim has been again examined by this committee, who, seeing no cause to change their former decision, recommend the payment of the claim. The former report is annexed for the information of the House, and a bill for the relief of the petitioner is herewith reported.

A BILL for the relief of Thomas Crown.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury pay to Thomas Crown, out of any moneys in the treasury not otherwise appropriated, the sum of six thousand dollars, in full payment of the damages sustained by him by reason of the refusal of the War Department to execute a contract entered into by said Crown with Captain George Blaney on the part of the government on the sixteenth day of March, eighteen hundred and twenty-six.

Case of Thomas Crown, upon his contract with Capt. Blaney, superintending engineer, to deliver the bricks requisite for constructing the Fort at Oak island.

Certain questions touching the law of contract, and presenting an obstacle at the threshold to the liquidation of Mr. Crown's claim under this contract, are alone submitted to my consideration for a professional opinion.

The general authority of Capt. Blaney, as superintending engineer, to contract for the work and materials requisite for the construction of the fort, seems undisputed and indisputable. But the objections to the claim are, first, such as originated with the Engineer Department itself, going to assert the *nullity* of the contract itself on its face, in consequence of supposed defects and vices in its frame and terms; secondly, objections and difficulties originating with Captain Blaney himself, after he found it expedient to devise apologies and excuses for breaking up the contract, and dismissing Crown from employment. The two sets of objections are wholly distinct from each other; those raised at the department were, of course, never thought of or imagined by Capt. B., but go to supersede and annul his act, because of his supposed want of skill to frame a sufficient and valid contract. Those subsequently raised by him were equally new to his superiors, and do not appear even to have been thought of at the department, till suggested to it by him, after he received its objections to the frame of his contract, and had been supplied with other motives for ridding himself of all connexion with Crown.

The contract was solemnly executed, pursuant to preliminary proposals made and accepted, on the 16th March, 1826. It was not till more than four months thereafter, nor till after Crown had, at vast expense, entered upon the actual performance of the contract, laid out his capital in expensive and laborious preparations adequate to the complete execution of his undertaking, and actually delivered, *in advance*, a portion of the bricks contracted for, that the notable discovery is made at the department, and thence communicated to Captain B., in a letter from Capt. Smith, dated 26th July, 1826, of such fatal defects and vices in the frame of the contract itself, as gave

it a one-sided operation ; such an operation, in short, as bound the government to pay the stipulated price of the bricks, delivered or not delivered, without any reciprocal legal obligation on Crown to deliver the article for which he was to receive payment. So far as Capt. B's skill as a conveyancer is in question, it seems to me that it would have required far more skill to have drawn a contract with this one-sided operation, than one of mutual obligation. Our wonder, at the first blush of such an objection to the contract, is raised to utter astonishment upon a simple reading of its terms ; where it is seen, at once, that Crown distinctly and positively covenants for the delivery of the entire quantity of bricks in several parcels and at specified times ; that the size and quality of the bricks are carefully prescribed, with an express provision for subjecting them to an *inspection* from a government agent before they shall be received and paid for ; and that the *actual delivery* of bricks of the prescribed size and quality, and so passing inspection, is made a *condition precedent* to the payments stipulated on the part of the government. The most skilful and experienced of professional scriveners could not have devised a contract of more complete reciprocity in its terms, nor have made the payments, stipulated for on the part of the government, more absolutely dependent on the condition precedent of performance on the part of Crown.

If astonishment go so far as to raise a doubt in one's mind whether the Engineer Department could have gravely put such a construction on the contract, the above-cited communication from Capt. Smith needs but a careful examination to see this objection, of the want of reciprocity, and of the one-sided operation of the contract there broadly, distinctly, and unequivocally stated and urged to the effect of making out the contract a nullity *ab initio*. I could scarce credit the first impression on my own senses from Capt. Smith's letter ; and it was only after repeated and more careful perusal, that I found myself compelled to yield to its too plain and unequivocal import. (See Doc. 21st Cong. 1st session, No. 8, p. 5.)

The only reason for this strange deduction from the terms of the contract is distinctly stated, and hinges merely and exclusively on the omission of a *pecuniary penalty* or *forfeiture* to be exacted of Crown in case of his *failure* to comply with the contract. A pecuniary penalty of forfeiture, reserved either in the body of the contract itself or in a collateral bond conditioned for the performance of the contract under a certain penalty, is distinctly assumed as indispensably necessary to give the contract a *binding effect* on Crown, and to afford the government a legal remedy against him for any breach of contract he might commit ; and as equally necessary to protect the government from a one-sided operation of the contract, binding them to pay the stipulated price of the bricks, whether delivered according to contract or not. I need not insist on the strange ignorance of the obvious and familiar law of contract that this notion argues, nor upon the equal efficacy of a simple covenant, without as with a penal sanction. It would be equally superfluous to attempt, at this time of day, to instruct any well informed man, in or out of the profession of the law, how utterly useless such penalties have become. Even in the strictness of ancient times, when they were recoverable at law, the courts

of equity always interposed to relieve against them upon just compensation being made for the breach of contract. But the time has long passed since they were recoverable even in strict law. The only effect of the penalty is to give the party grieved an option between two forms of action, debt and covenant; and in either form of action, the result is precisely the same—a mere recovery to the amount of the *actual damage* sustained by the breach of contract. The penalty is now universally liquidated by an assessment of the actual damage; and such assessment must be precisely the same whether the form of the action be debt or covenant.

A minor objection to the mere detail of the contract is stated in the said letter from the Engineer Department—something about the aid to be furnished by the government in the reception of the bricks being too *indefinitely stated*. The bearing or importance of this objection is not perceived. But it is not started as one at all affecting the validity of the contract; and if there were anything material in it originally, it was rather too late to think of it after the contract had been more than four months in actual operation, and in a regular course of practical execution. It seems never to have entered the mind of the Engineer Department that any of these objections went to the monstrous injustice of a total renunciation of the contract and of a discharge of the contractor from public employ. The aforesaid communication from the department, signed by Captain Smith, concludes with a recommendation that “the contract, as it is, being a *nullity*, it will be necessary to *modify* it to make it *binding*, or perhaps it would be better to make a new one;” and, in truth, Mr. Crown never thought of making any difficulty about a modification and reform in the terms of the contract, in the particulars indicated in the communication from the Engineer Department; though clearly not bound, at that period and under the then circumstances of the parties, to submit to any arbitrary modification, he was ready without hesitation to acquiesce; he had no objection to the annexation of a penalty in either of the forms proposed, nor to a more definite stipulation about the aid to be afforded in the delivery of the bricks. No difficulty whatever arose upon either of those points. But *new and before unthought-of* difficulties were raised by Captain B. after he received the above-mentioned communication from the department; and eventuated in driving Mr. Crown from his undertaking and compelling him to abandon his contract, in order to get rid of the embarrassments and difficulties thrown in his way by Captain B.

This brings us to the more particular consideration of the new difficulties and objections started by Captain B. in July and August, 1826, and then started, for the first time, soon after he had received the communication from the department condemning the frame of the contract. These are found originally stated in an official report from Captain B. to the Engineer Department, dated 9th August, 1826. [See the above-cited Doc. No. 8, pp. 3 and 4.] The same topics are reiterated, with some variation and considerable aggravation, and transmitted by him some years afterwards to the then chairman of the Committee of Claims, Mr. McIntire, with the original contract and some other documents thereto annexed, and now among the papers before the present committee. The more material of his allegations

against Mr. Crown, and by which he attempts to justify the measures by which he ultimately succeeded in driving Crown to an abandonment of the work, may be summed up as follows:

1. He alleges that the contract was never *consummate*, but was only *inchoate*, in consequence of a collateral stipulation or condition *verbally* understood and expressed at the time of its execution, that it was *not to be binding* till Crown had furnished two sufficient *bondsmen* as *sureties* for his performance of the contract; and that, as Crown never complied with this condition, the contract was never *binding* and *operative*.

This allegation rests entirely upon Captain B.'s *ipse dixit*. He does, indeed, refer to a Lieutenant Tuttle, who, he says, was present and knew the fact; but this gentleman has never been called to verify the assertion. Mr. Crown has positively denied it; though, when required, four or five months after the execution of the contract, to furnish these bondsmen, he passively acquiesced, overborne as he was by the power over him, which Captain B. seemed to arrogate in consequence of the actual contracts having been declared a nullity by the department; and he proposed to give such bondsmen, if allowed a reasonable time to procure them. This argues nothing to prove that such a condition was annexed to the *original* contract as *actually signed*; but a mere *concession* of a man supposed to be in the power of others, helpless to resist their requisitions, or unable to make a stand against them, without involving himself in ruin, and called upon to enter into a *new* contract, with new stipulations and modifications, in consequence of the erroneously assumed nullity of the contract already executed.

That this condition of "*bondsmen*" (so called) was a mere *afterthought* of Captain B., after he received the communication from the department, dated July 26, 1826, and not an original condition annexed to the contract, and even if it had been so, that it was afterwards entirely waived and given up, are propositions perfectly clear, in my opinion, from the documents and notorious circumstances in the case.

In the first place, as the contract called for no advances of money to the contractor, there was no occasion for such bondsmen. They were not required of the contractors for *stone*, nor subsequently of Potter and others under contracts for the same bricks Crown was to have supplied.

Then, looking to the terms of the contract itself, and of the documents connected with its formation and execution, we see the whole substratum of the contract *excluding* such a condition. Then looking to see how the contract, after its execution, was treated and considered by the parties to it, and carried into *actual operation*, and continued to be so treated and considered four or five months without hint of any such condition, it appears to me proved, beyond the possibility of doubt, that it was considered and treated and acted on by all the parties to it as a *consummate*, not as a merely inchoate or incomplete contract; and, therefore, either that no such condition was ever annexed, or if annexed, that it had been waived and given up by common consent. I think, however, the internal evidence all goes

clearly to the conclusion that the condition never existed at all, but was an afterthought, and was most unjustly and oppressively imposed on the contractor.

I will now concisely refer to the documents and notorious circumstances that establish this conclusion.

Captain B.'s original advertisement, (No. 1,) inviting *proposals* for the contract, though it goes into some details as to the *conditions* of the proposed contract, is absolutely silent on any such condition as bondsmen; and in legal construction, as well as to the common sense and practice of men in such cases, *excludes* such a *condition*.

Captain B.'s letter, (No. 2,) 16th March, 1826, to Mr. Crown, *unconditionally accepting* his proposals, with some reservation of a contingency as to the quantity of bricks to be contracted for, equally *excludes* such a *condition*.

Captain B.'s original *list*, reported to the Engineer Department, of the proposals he had received in consequence of his *advertisement*, notes the *unconditional* acceptance of Crown's proposals, and formally and officially certifies to the department "that the *contract entered into* between T. Crown and himself for the delivery of 3,000,000 bricks, &c., *was made* on the most favorable terms." (See printed Doc. No. 8, p. 6.) Here the contract is reported and treated in terms, at the time of its execution, as entirely consummate; as a contract "*entered into*"—"made."

Then a copy of the contract, *in extenso*, is transmitted by Captain B. to the department, as a consummate and binding instrument, without the remotest suggestion or hint of any condition yet to be performed in order to give it effect.

When the department comes to notice the contract, (a copy of which had been so reported and transmitted by Captain B.,) and to state objections, these objections equally excludes any inference or hypothesis of there being such a collateral condition yet to be performed, as Captain B. afterwards suggested. All the objections of the department turn exclusively upon the intrinsic terms of the instrument itself; it is clear that, those objections being removed, the department viewed the contract as consummate and unexceptionable in all other respects. A mere *penalty* was all that was thought necessary to give *binding effect* to the contract. What is there said about a *collateral bond* has no reference whatever to collateral *sureties* to the bond; it is only one of two modes proposed for giving the contract the sanction of a mere *penalty*, and either mode would equally have satisfied the department; either a penalty reserved in the body of the contract, or in a collateral bond conditioned for the performance of the contract. Neither of these, the one more than the other, imports that *bondsmen* or *sureties* are required. By placing the *collateral bond* on the same footing as the mere reservation of a penalty in the body of the contract, the idea of *sureties* is absolutely excluded. Indeed, it is impossible to read Captain Smith's letter without seeing plainly that the idea of bondsmen or sureties never entered the mind of the Engineer Department.

Again: Mr. Crown, being in want of some pecuniary aid to execute the work he proposed to undertake, obtained from Mr. Leckie a loan

of \$800, in anticipation of his proposals being accepted; proposing to refund the loan out of the money to be received on account of his bricks. Accordingly, Mr. Leckie, on the 2d of March, 1826, wrote a letter to Captain B., highly recommending Crown, and wishing to know whether, if he obtained the contract, Captain B. would honor his draft for the \$800; to which Captain B., on the 16th of March, 1826, (the very day the contract was executed,) answers that he will “*accept and pay* the order of Mr. Crown for the sum mentioned, or for *any other sum*, whenever he shall *deliver bricks* to the amount of the order.” Now, here the mere *delivery* of bricks is made the only condition of accepting and paying the draft; and if there were really no binding contract at the time, but the whole rested upon the performance of the condition of giving bondsmen, must not Captain B. have further qualified his promise to accept and pay, by the proviso that Crown *consummated* the contract, and, in fact, became the *contractor* for the delivery of the bricks? The terms of the answer to Leckie clearly recognise Crown as contractor, in fact, at that time, and exclude every other qualification of the acceptance and payment of Crown’s order, except that of the actual delivery of bricks *according to contract*. (See the correspondence between Captain B. and Leckie, annexed to Captain B’s aforesaid statement to the former committee. C. D. No. 4.)

The admitted facts, already adverted to, are conclusive of themselves. Crown had, in due time, established his brick manufactory on an adequate scale; had, by the month of July, and long before Captain Blaney raised this difficulty about bondsmen, actually manufactured 800,000 bricks, being within 200,000 of the amount of the very *first delivery*, which, according to the contract, was to be 1,000,000 delivered on the 1st October; so that he had taken time by the forelock, and had four-fifths of the quantity ready three or four months beforehand: he had actually delivered 5,000 of the bricks as early as June, four months before the time fixed for the first delivery. Here, then, is part execution by *both parties* of a contract which had been standing, with all the *solemnities* of a consummate instrument, for more than four months; which had been officially reported, and all along acted on during that period as a consummate contract, without whisper or hint from any quarter that it depended for its *binding effect* upon any collateral condition whatever. Under these circumstances, and after all this lapse of time, the parties, one and all, would have been absolutely *estopped* (if I may use a technical term) in a court of law, to deny the consummate execution and binding force of the contract, and, therefore, all evidence of any collateral condition about bondsmen would have been excluded; or, if such evidence had been admitted, the court would unquestionably have instructed the jury that a waiver and abandonment of the condition ought, under the circumstances, to be *presumed*.

But I am clear in the opinion that, upon the strictest legal principles, such a condition, if fully proved according to the statement of Captain Blaney, would have been nugatory and *void, ab initio*; that, independent of the circumstances of the subsequent recognition and part execution of the contract already adverted to, the supposed con-

dition never could have operated one instant to suspend the consummation and binding effect of the contract. The soundest and most universally admitted principles of law would have forbidden it. No written contract, especially a contract under seal, can be, in any manner, varied or modified by setting up any *parol* contract, condition, or understanding, as collateral to it. The sealed contract is a complete *estoppel* (as the legal phrase is) to any pretence of other terms or conditions but what the contract expresses on its face, or necessarily implies by the fair construction of its terms. True, a deed may be delivered to a *third person* as an *escrow*, subject to regular delivery, *in futuro*, to the party, upon performance of a *parol* condition proved by *parol* evidence; but it never can be treated as an *escrow* after solemn execution and delivery to a party. Once *delivered* by *consent* of parties, and it can no longer be an *escrow*, but instantly becomes consummate and absolute. Here there is no pretence, nor shadow of pretence, for treating this contract as an *escrow*. It was regularly executed and delivered to the *party*, treated and acted on by both parties, for more than four months, as a consummate instrument, actually carried into practical effect and operation by both, and in part *performed* as a *consummate and operative* contract.

Escrow being out of the question, the whole pretence of a collateral *parol* condition about bondsmen is absolutely impertinent and nugatory.

If, however, the question could in any manner be made to turn on the *fact*, or on *parole* evidence of the fact, of such a condition having been originally agreed to verbally at the time of the execution of the contract, the fact could not be said to be satisfactorily established by the statement of Captain Blaney.

He refers to evidence, in corroboration of his statement, never to this day produced—the evidence of Lieutenant Tuttle. His statement, being the statement of a *party*, is met by the positive denial of the other party. It is inconsistent with, and most conclusively repelled by, all the facts and circumstances preceding, accompanying, and following the execution of the contract—inconsistent with all his own sayings, actings and doings for more than four months after the execution of the contract. The pretence is set up at a time (July or August, 1826) when he had a *new* motive and a direct interest to imagine and trump up some apology for his conduct. The contract which he had drawn and executed had been condemned by his superiors as so negligently or ignorantly drawn as to have imposed an obligation on the government to pay the price of the bricks, without any reciprocal obligation on Crown to deliver them. Manifest as was the absurdity of this notion, he had an obvious motive and an interest of professional pride to clear his skirts of the gross ignorance and negligence implied by the objections to his contract urged by his superiors; and this he attempts by the almost equally absurd pretext of Crown's original stipulation to give a collateral bond, with sureties, and of a mutual understanding that the contract was to remain unconsummate and suspended from all binding effect till such bond and security were given, though he most inconsistently admits, or clearly shows, that it was in the meantime carried into practical

effect and operation without an instant's delay—as if a contract could operate and be carried into execution as such whilst it stood suspended and was no contract, but a mere *project* of contract, waiting for some act to be done before it could operate as a contract.

I say nothing of the more interested and corrupt motives attributed to him—and under a strong suspicion of which he appears to have labored at the time—of a secret participation with Potter in the profits of the contract with that person when it was contrived to bring him in to supersede Crown in the business.

2. Captain B.'s next charge against Crown is, that, of the 800,000 bricks which he admits had been manufactured between March and July, there were only 250,000 fit to pass inspection, and to be worked up in the fort.

Now, admitting for a moment this charge to be true in its terms, what does it amount to, and how may it possibly affect Crown's rights under the contract, or establish against him anything approaching a breach of contract? This immense quantity of bricks had been manufactured so early as July, at least three months *before* the time (1st October) when Crown was *bound* by the contract to deliver any bricks at all; one-third of the whole, that is, 1,000,000, being deliverable on the 1st October, one-third on the 30th November, and the remaining one-third on the 31st December. All that might be delivered any time before the 1st October, depended entirely on Crown's own option; nothing can be clearer from the terms of the contract than this, that he was not *bound* to deliver a single brick until the 1st October, 1826, but might, at his option, deliver them any time before. Then, if it were clearly proved that, in July, 1826, 550,000 of the bricks then burnt were unfit to be received, he had abundance of time before the 1st October to make up the deficiency, and could be charged with no sort of default under his contract before the last-named period.

But is the fact satisfactorily proved, by any means, that the bricks which Crown had ready for delivery by the month of July, 1826, were of the bad quality represented by Captain B., in the proportion of 550,000 to 800,000?

For this fact, again, we have nothing but Captain B.'s *ipse dixit*. He produces no actual *inspection* and *condemnation* of the bricks, nor any other sort of evidence to corroborate his statement; but he is most powerfully, if not conclusively, contradicted in this fact by the positive evidence of several credible and unsuspected witnesses, and by several cogent *circumstances* appearing in the case.

Alfred Emerson proves that he was present when Capt. B. refused to receive the bricks, and that his refusal was grounded, *not* on any alleged defect in the *quality of the bricks*, but expressly of an alleged defect in the *contract* between him and Crown. The particular defect in the contract alleged by Captain B. is not recollected by the witness, but it must have been either the absurd one pointed out by the Engineer Department in Capt. Smith's letter, or else the newly set up pretext of Capt. B. himself, of the want of bondsmen.

Three other witnesses, James H. Henry, David Hepburn, and a person whose deposition was taken at Norfolk, in March, 1836, Z. Hawkins, [No. 7, 8, 9,] all expressly prove the good quality of the bricks;

and further prove the damning fact, that the very same bricks, which Capt. B. affects to condemn as of bad quality in the hands of Crown, were immediately afterwards accepted of Potter as good bricks, and actually worked into the fort, after poor Crown had been compelled by the chicaneries of Capt. B. to sell the bricks, at a reduced price and at a cruel sacrifice, to Potter, and let him take his (Crown's) place as contractor for bricks; they further prove that these very bricks were of better quality than those afterwards manufactured by Potter, and accepted as good bricks and worked into the fort. These three witnesses had the best opportunities of observing and knowing the facts to which they testify, as will be obvious from a reference to their depositions, and to their employment as artisans on the work. One of them, Henry, had been employed by Crown as a brickmaker in his yard, and was afterwards continued in the same employment by Potter after he took the yard. The fact, therefore, was within his personal observation and certain knowledge; he could not be under any honest mistake; the facts he proves must be true, or he perjured. So the other two witnesses, Hepburn and Hawkins, were both *bricklayers* employed by Capt. B. on the construction of the fort; their means of personal knowledge of the facts testified by them equally excludes any possible presumption of honest mistake.

General Gratiot, indeed, in his letter to the Secretary of War, dated 20th February, 1829, (see the above-cited document, No. 8, p. 2,) does make a suggestion benevolently intended to ease off Capt. B. from this damning fact. "With respect," he says, "to the statement that Capt. B. purchased afterwards from *Mr. Potter* the bricks which he had refused to receive from *Mr. Crown*, there is no other evidence than that contained in the papers furnished by Mr. Crown; and, *without impeaching the veracity of either of the deponents to that fact*, it is evident that the one may have been *misinformed* as to the *identity* of the bricks purchased from Potter, and that the other may have worked up in the fort bricks *made by Crown*, since there is evidence of *purchases* having been made from *him* by Capt. B." Now this hypothesis, in both its branches, is purely gratuitous; nay, gratuitous as it is, General Gratiot has clearly misapprehended the force and bearing of the evidence. Henry, the first witness to whom he alludes, does not speak on *information* at all, but on personal knowledge, and obviously with the best means of personal knowledge. What ground, then, for the general's hypothesis of "*misinformation*?"

As to the other hypothesis, upon which the general accounts for possible error in the evidence of the two other witnesses, namely, that the bricks of Crown's manufacture, which they speak of having worked up in the fort, were only those which Capt. B. had purchased of Crown himself, not those sold by Crown to Potter, and by him afterwards delivered to Capt. B., it is evident the general has inadvertently fallen into some confusion and misapprehension respecting the evidence. He speaks of "evidence of *purchases* having been made from him [Crown] by Capt. B."

Now, what "evidence of purchases" can be here alluded to? The only purchase from Crown—that is, the only delivery of bricks by him—was of the small quantity of 5,000 delivered so early as the 28th

of June, the month before his establishment was turned over to Potter; yet the general speaks of "*purchases*" indefinitely. It has struck me that he may possibly have been misled by some similitude in the appearance of two different names as they are written in Mr. Hagner's statement, (No. 10,) of bricks purchased and paid for by Capt. B., where may be seen in the same list the names of Thomas Crown and Thomas Cowan; the first being put down for 5,000 bricks delivered on the 28th June, 1826, the last for 286,000 in January, 1827, long after poor Crown had been driven off by the intrigues and chicaneries practised against him.

However this be, the least careful examination of the depositions must put it beyond the range of any moral or legal probability, and of any rational presumption, that these witnesses could have confounded the 5,000 bricks delivered by Crown in June, 1826, with those delivered by Potter after he had displaced Crown. One of them, Hepburn, was not employed on the work till November, five months after the 5,000 bricks had been delivered, and the others, though employed from the beginning—the one in the brickyard, the other on the masonry of the fort—show, in the whole context of their evidence, too plainly to be misunderstood, that they speak with intelligence and discrimination of the bricks delivered by Potter after he had displaced Crown.

The statement of Mr. Hagner, just referred to, supplies matter of strong corroboration to the evidence (if it wanted corroboration) of these witnesses, as it shows that Potter had by the 31st *July* delivered 378,000 *hard-burnt* bricks. Now, this was almost immediately after the establishment was turned over to him, and before he could possibly have had time to manufacture and burn the bricks. (See Mr. Hagner's statement, No. 10.)

3. The last of Capt. B's pretexts for ousting Crown of his employment is twofold—his want of *capacity*, and his want of *means* to carry on the work.

His industry and bodily exertions are admitted in terms as exemplary; his honest and persevering endeavors to perform the work are not questioned. 'Tis his *capacity*—meaning, I suppose, mental capacity—alone that is objected to. Now, if he had not sufficient capacity for a *brickmaker*, what could he have had any capacity for? It was a profession which he had pursued with success, and on the largest scale, for many years, and in which he had acquired the largest experience. If, in all that time, and with all that experience, he had not capacity to learn such a mechanical profession, and to acquire competent skill in it, he could have had no more brains than one of his own bricks; absolute and hopeless idiocy, at least, must be imputed to him. The very practice and experience he is proven to have had in the business must have eminently qualified him for the undertaking, supposing him not to be a born idiot. He had been most extensively employed in this city and other places in the very business of conducting the practical operations of brickyards on the largest scale; and among other undertakings of the same kind, had manufactured the bricks for Fort Washington. Yet, with all this long and diversified experience, after the great number of most competent judges with whom he had

come in contact in the course of his business had vouched his capacity and fitness, Capt. B. is the very *first* and the very *last* who pretends to have detected any want of capacity.

His capacity, indeed his eminent qualifications from long and large experience, for the business, are vouched for by numerous witnesses, themselves most competent judges, and of unquestionable veracity. The late Robert Leckie alone, if all the others were out of the way, would be sufficient to annihilate the assertion of Capt. B. on this point. Mr. Leckie was one of the most respectable in point of character, and one of the most skilful and best instructed, of our mechanics; indeed, a general architect of respectable standing. To his, are added the positive unequivocal testimonials of many gentlemen; some of whom, from their professional pursuits as military engineers, others, from their experience as employers of mechanics to furnish materials and execute brickwork, may be considered as eminently qualified to judge of the matter; and I will therefore simply refer to the testimonials, before the committee, of Robert Leckie, General Gratiot, Colonel Bomford, Major Wade, Commodore Rodgers, A. B. McLane, and Wm. A. Bradley. [Nos. 11, 12, 13, and Mr. Leckie's before-mentioned letter to Capt. B., dated 2d March, 1826, annexed as exhibit C. to Capt. B.'s statement.]

Capt. B.'s charge of incapacity being thus trampled under foot, the very circumstances of his having urged so groundless a complaint to his superiors against Mr. Crown sufficiently evinces his evil disposition towards the individual, and the evil motives that must have actuated him in persecuting that individual out of his lawful and proper employment in the public service.

The want of *means*, which Capt. B. has coupled with the want of capacity, is a complaint equally groundless, and just as completely overwhelmed by evidence in contradiction of it as the other, and in one view, perhaps, has a more malignant aspect.

The very fact that Crown had completed his brick-yards and manufacturing establishment upon such a scale as to have 800,000 bricks manufactured and ready for delivery three months in advance of the time fixed for his first delivery of bricks under the contract, does, of itself, refute the complaint of inadequate means. Mr. Leckie (No. 11) proves that he entered on the business with a ready-money capital of at least \$1,300, \$800 of which was lent by Mr. Leckie himself, and that capital backed by a fair personal credit. When he commenced operations under the contract he found no difficulty, though a stranger, in obtaining what credit he required, in anticipation of his expected receipts on account of bricks. If he had been fairly dealt with by Capt. B. he would have had abundant funds, and in full time, to discharge his engagements and keep up his credit. At the very time he was forced by the cavils, chicaneries and intrigues of Capt. B. and Potter to surrender his establishment, and was made to feel the pressure of pecuniary embarrassment, he was entitled to receive of Capt. B. abundant funds to place him at ease. The 800,000 bricks, at \$7 75, should have placed at his disposal \$6,200 in ready money; and even if Capt. B. were sustained, as he is most victoriously contradicted, in saying that only 250,000 of that quantity of bricks were fit to

be received under the contract, even then the \$1,937 50, which, without any dispute, he was entitled to for the latter quantity, would have enabled him to prosecute the work with credit and advantage. But the evidence is positive and clear that Capt. B., in July, refused to receive any of the bricks, but insisted on Crown's selling out to Potter.

Then, the very embarrassments brought suddenly upon Mr. Crown, and the only want of means or credit ever manifested in the course of his operations, were all the direct effects of Capt. B.'s chicanery and oppression; and he has the grace to set up the *consequences* of his own misconduct as the apology for that very misconduct, and as *criminatory* of the *victim* of that misconduct.

I do not think it at all material to trouble the committee with any remarks upon any of the points in the case; but these general principles of the law of contract, and of the evidence by which the execution of the contract, and the excuses for the breach of it, should be determined.

The evidence of Mr. Leckie and others will supply the data whereby to estimate the losses of the claimant, or the equitable compensations that ought, *ex equo and bono*, to be awarded him.

W. JONES.

FEBRUARY 20, 1837.

DISTRICT OF COLUMBIA, } *set.*
Washington County.

On this 2d day of February, 1848, personally appeared before the undersigned, a justice of the peace in and for the county of Washington, David Hepburn, called in behalf of Thomas Crown, to give a statement which is deemed important to a claim of said Crown now pending before Congress. Said deponent states on oath that he is a resident of Washington city, and has often been employed upon public works for the general government; that he was at Oak island, North Carolina, in the winter of 1826-'27, in the employment of the government as brick and stone mason, under the superintendence of Capt. George Blaney, corps of engineers; that when the time of payment came for the work performed by this deponent, the said Blaney offered to pay deponent and other workmen in like employment in the notes of the bank of Cape Fear, (N. C.) which were then depreciated two and a half per centum in the immediate neighborhood, and five per centum at the north; that no settlement could be made for his work with said Blaney until deponent agreed to receive one-half of his pay in Cape Fear notes and the other half in good money, and that a settlement was thus made not until the expiration of two days; that great excitement among the workmen arose out of this transaction, from a conviction that an officer of the government of the United States ought not to pay out bad money when he was furnished with good money by the government, and that Captain Blaney was told by this deponent that if anything was made on the good money the workmen preferred making it themselves. That deponent promised the said Blaney never to make any mention of this moneyed transaction unless he should be called upon, as he now conceives himself to be by

Mr. Crown. That this deponent is the same person mentioned on page nine of House Report No. 645, 1st session 29th Congress.

DAVID HEPBURN.

Sworn and subscribed before me, a justice of the peace in and for said county.
B. K. MORSELL, J. P.

HOUSE OF REPRESENTATIVES—*March 14, 1848.*

The Committee of Claims, to whom was referred the petition of Thomas Crown, report :

The committee have examined this claim with considerable care, and are of opinion that the bill heretofore reported from this committee ought to pass. The former report upon the claim is adopted and made a part of this, and a bill (being a copy of one reported at the last Congress, and not acted upon from want of time) herewith reported for the relief of the petitioner.

HOUSE OF REPRESENTATIVES—*May 5, 1846.*

The Committee of Claims, to whom was referred the memorial of Thomas Crown, report :

The memorialist states, that in 1826 he made a contract with Captain George Blaney, acting for the government of the United States, for the delivery of 3,000,000 bricks at Oak island, on the Cape Fear river, in North Carolina, viz: one million on or before the 1st of October, 1826, one million on or before the 1st of November, and one million on or before the 31st of December, 1826, to be used in the construction of the fortification at that place, for which he was to receive \$23,250, being at the rate of \$7 75 per thousand, and that he was to be paid as the bricks, or any part of them, were delivered; that he immediately made the necessary arrangements and preparations, which subjected him to considerable expense, and commenced the making of the bricks according to his contract; that in July he was prepared to deliver 800,000 bricks, and did deliver 5,000, and would have been able to fulfil his contract to the letter and spirit, but for the interference of the said Captain Blaney, and his refusal to receive the bricks; that he was compelled by Blaney to sell the bricks which he had made to a man named Potter, and relinquish his contract, and that the same bricks were afterwards received from Potter by the said Blaney, and used in the construction of the fortification. These facts are sufficiently proved by the testimony, and the violation of the contract on the part of the government is established. The question of damage alone remains to be adjudicated. Crown states that he sustained damage to the amount of \$6,000, but he offers no proof of the amount for which he sold the bricks to Potter, which the

engineer had refused to receive from him, and afterwards received from Potter, and had worked into the fortification. The difference between the price he received from Potter and the contract price, should be the measure of the damages upon this point. It appears that he had made between 800,000 and 1,000,000 of bricks, 5,000 of which had been delivered, and that he sold the remainder to Potter, who sold them to Captain Blaney. The proof is not conclusive that Potter sold all to Captain Blaney, but there is sufficient evidence that the bricks made by Crown were as good as any that were used in the fortification, and should have been received. There is no proof of the amount paid by Potter to Crown for those bricks, and the committee are left to conjecture as to the amount of damage thereby sustained. But it is stated upon oath that he (Crown) received but \$600, and that his actual loss was \$6,000. If he received but \$600 for the bricks sold to Potter, it is reasonable to suppose that that sum, and the loss, with the interest upon the amount, would now be much more.

The committee have thought proper to order that the principal documents should be appended to the report for the consideration of the House. A bill for the relief of the petitioner is herewith reported to the House.

No. 1.

Case of Thomas Crown, upon his contract with Captain Blaney, superintending engineer, to deliver the bricks requisite for constructing the fort at Oak island.

Certain questions touching the law of contract, and presenting an obstacle at the threshold to the liquidation of Mr. Crown's claim under this contract, are alone submitted to my consideration for a professional opinion.

The general authority of Captain Blaney, as superintending engineer, to contract for the work and materials requisite for the construction of the fort, seems undisputed and indisputable. But the objections to the claim are, first, such as originated with the Engineer Department itself, going to assert the *nullity* of the contract itself on its face, in consequence of supposed defects and vices in its frame and terms; secondly, objections and difficulties originating with Captain Blaney himself, after he found it expedient to devise apologies and excuses for breaking up the contract, and dismissing Crown from employment. The two sets of objections are wholly distinct from each other; those raised at the department were, of course, never thought of or imagined by Captain B., but go to supersede and annul his act, because of his supposed want of skill to frame a sufficient and valid contract. Those subsequently raised by him were equally new to his superiors, and do not appear even to have been thought of at the department till suggested to it by him, after he received its objections to the frame of his contract, and had been supplied with other motives for ridding himself of all connexion with Crown.

The contract was solemnly executed, pursuant to preliminary proposals made and accepted, on the 16th March, 1826. It was not till more than four months thereafter, nor till after Crown had, at vast expense, entered upon the actual performance of the contract, laid out his capital in expensive and laborious preparations adequate to the complete execution of his undertaking, and actually delivered, *in advance*, a portion of the bricks contracted for, that the notable discovery is made at the department, and thence communicated to Captain B., in a letter from Captain Smith, dated July 26, 1826, of such fatal defects and vices in the frame of the contract itself, as gave it a one-sided operation; such an operation, in short, as bound the government to pay the stipulated price of the bricks, delivered or not delivered, without any reciprocal legal obligation on Crown to deliver the article for which he was to receive payment. So far as Captain B's skill as a conveyancer is in question, it seems to me that it would have required far more skill to have drawn a contract with this one-sided operation than one of mutual obligation. Our wonder at the first blush of such an objection to the contract, is raised to utter astonishment upon a simple reading of its terms; where it is seen, at once, that Crown distinctly and positively covenants for the delivery of the entire quantity of bricks in several parcels, and at specified times; that the size and quality of the bricks are carefully prescribed, with an express provision for subjecting them to an *inspection* from a government agent before they shall be received and paid for; and that the *actual delivery* of bricks of the prescribed size and quality, and so passing inspection, is made a *condition precedent* to the payments stipulated on the part of the government. The most skilful and experienced of professional scriveners could not have devised a contract of more complete reciprocity in its terms, nor have made the payments, stipulated for on the part of the government, more absolutely dependent on the condition precedent of performance on the part of Crown.

If astonishment go so far as to raise a doubt in one's mind whether the Engineer Department could have gravely put such a construction on the contract, the above-cited communication from Captain Smith needs but a careful examination to see this objection, of the want of reciprocity, and of the one-sided operation of the contract, there broadly, distinctly, and unequivocally stated and urged, to the effect of making out the contract a nullity *ab initio*. I could scarce credit the first impression on my own senses from Captain Smith's letter; and it was only after repeated and more careful perusal, that I found myself compelled to yield to its too plain and unequivocal import. (See Doc. No. 8, 21st Congress, 1st session, page 5.)

The only reason for this strange deduction from the terms of the contract is distinctly stated, and hinges merely and exclusively on the omission of a *pecuniary penalty* or *forfeiture* to be exacted of Crown in case of his *failure* to comply with the contract. A pecuniary penalty or forfeiture, reserved either in the body of the contract itself, or in a collateral bond conditioned for the performance of the contract under a certain penalty, is distinctly assumed as indispensably necessary to give the contract a *binding effect* on Crown,

and to afford the government a legal remedy against him for any breach of contract he might commit; and as equally necessary to protect the government from a one-sided operation of the contract, binding them to pay the stipulated price of the bricks, whether delivered according to contract or not. I need not insist on the strange ignorance of the obvious and familiar law of contract that this notion argues, nor upon the equal efficacy of a simple covenant, without as with a penal sanction. It would be equally superfluous to attempt, at this time of day, to instruct any well informed man, in or out of the profession of the law, how utterly useless such penalties have become. Even in the strictness of ancient times, where they were recoverable at law, the courts of equity always interposed to relieve against them, upon just compensation being made for the breach of contract. But the time has long passed since they were recoverable even in strict law. The only effect of the penalty is to give the party grieved an option between two forms of action, debt and covenant; and in either form of action the result is precisely the same—a mere recovery to the amount of the *actual damage* sustained by the breach of contract. The penalty is now universally liquidated by an assessment of the actual damage; and such assessment must be precisely the same, whether the form of the action be debt or covenant.

A minor objection to the mere detail of the contract is stated in the said letter from the Engineer Department—something about the aid to be furnished by the government in the reception of the bricks being too *indefinitely stated*. The bearing or importance of this objection is not perceived. But it is not started as one at all affecting the validity of the contract; and if there were anything material in it originally, it was rather too late to think of it after the contract had been more than four months in actual operation, and in a regular course of practical execution. It seems never to have entered the mind of the Engineer Department that any of these objections went to the monstrous injustice of a total renunciation of the contract, and of a discharge of the contractor from public employ. The aforesaid communication from the department, signed by Captain Smith, concludes with a recommendation that “the contract, as it is, being a *nullity*, it will be necessary to *modify* it to make it *binding*, or, perhaps, it would be better to make a new one;” and, in truth, Mr. Crown never thought of making any difficulty about a modification and reform in the terms of the contract, in the particulars indicated in the communication from the Engineer Department; though clearly not bound, at that period and under the then circumstances of the parties, to submit to any arbitrary modification, he was ready without hesitation to acquiesce; he had no objection to the annexation of a penalty in either of the forms proposed, nor to a more definite stipulation about the aid to be afforded in the delivery of the bricks. No difficulty whatever arose upon either of those points. But *new* and *before unthought-of* difficulties were raised by Captain B. after he received the above-mentioned communication from the department, and eventuated in driving Mr. Crown from his undertaking, and compelling him to abandon his contract, in order to

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get rid of the embarrassments and difficulties thrown in his way by Captain B.

This brings us to the more particular consideration of the new difficulties and objections started by Captain B. in July and August, 1826, and then started, for the first time, soon after he had received the communication from the department condemning the frame of the contract. These are found originally stated in an official report from Captain B. to the Engineer Department, dated August 9, 1826. [See the above-cited Doc. No. 8, pages 3 and 4.] The same topics are reiterated, with some variation and considerable aggravation, and transmitted by him, some years afterwards, to the then chairman of the Committee of Claims, Mr. McIntire, with the original contract and some other documents thereto annexed, and now among the papers before the present committee. The more material of his allegations against Mr. Crown, and by which he attempts to justify the measures by which he ultimately succeeded in driving Crown to an abandonment of the work, may be summed up as follows:

1. He alleges that the contract was never *consummate*, but was only *inchoate*, in consequence of a collateral stipulation or condition *verbally* understood and expressed at the time of its execution, that it was *not to be binding* till Crown had furnished two sufficient *bondsmen* as *sureties* for his performance of the contract; and that, as Crown never complied with this condition, the contract was never *binding* and *operative*.

This allegation rests entirely upon Captain B.'s *ipse dixit*. He does, indeed, refer to a Lieutenant Tuttle, who, he says, was present and knew the fact; but this gentleman has never been called to verify the assertion. Mr. Crown has positively denied it; though, when required, four or five months after the execution of the contract, to furnish these bondsmen, he passively acquiesced, overborne as he was by the power over him, which Captain B. seemed to arrogate, in consequence of the actual contract having been declared a nullity by the department; and he proposed to give such bondsmen, if allowed a reasonable time to procure them. This argues nothing to prove that such a condition was annexed to the *original* contract as *actually signed*, but a mere *concession* of a man supposed to be in the power of others, helpless to resist their requisitions, or unable to make a stand against them, without involving himself in ruin, and called upon to enter into a *new* contract, with new stipulations and modifications, in consequence of the erroneously assumed nullity of the contract already executed.

That this condition of "*bondsmen*" (so called) was a mere *afterthought* of Captain B., after he received the communication from the department, dated July 26, 1826, and not an original condition annexed to the contract, and, even if it had been so, that it was afterwards entirely waived and given up, are propositions perfectly clear, in my opinion, from the documents and notorious circumstances in the case.

In the first place, as the contract called for no advances of money to the contractor, there was no occasion for such bondsmen. They were not required of the contractors for *stone*, nor subsequently of Potter and others under contracts for the same bricks Crown was to have supplied.

Then, looking to the terms of the contract itself, and of the docu-

ments connected with its formation and execution, we see the whole substratum of the contract *excluding* such a condition. Then, looking to see how the contract, after its execution, was treated and considered by the parties to it, and carried into *actual operation*, and continued to be so treated and considered four or five months without hint of any such condition, it appears to me proved, beyond the possibility of doubt, that it was considered, and treated, and acted on, by all the parties to it, as a *consummate*, not as a merely inchoate or incomplete contract; and, therefore, either that no such condition was ever annexed, or, if annexed, that it had been waived and given up by common consent. I think, however, the internal evidence all goes clearly to the conclusion that the condition never existed at all, but was an afterthought, and was most unjustly and oppressively imposed on the contractor.

I will now concisely refer to the documents and notorious circumstances that establish this conclusion.

Captain B.'s original advertisement (No. 1) inviting *proposals* for the contract, though it goes into some details as to the *conditions* of the proposed contract, is absolutely silent on any such condition as bondsmen; and in legal construction, as well as to the common sense and practice of men in such cases, *excludes* such a *condition*.

Captain B.'s letter, (No. 2,) 16th March, 1826, to Mr. Crown, *unconditionally accepting* his proposals, with some reservation of a contingency as to the quantity of bricks to be contracted for, equally *excludes* such a *condition*.

Captain B.'s original *list*, reported to the Engineer Department, of the proposals he had received in consequence of his advertisement, notes the *unconditional acceptance* of Crown's proposals, and formally and officially certifies to the department "that the *contract entered into* between T. Crown and himself for the delivery of 3,000,000 bricks, &c., *was made* on the most favorable terms." [See printed Doc. No. 8, p. 6.] Here the contract is reported and treated in terms, at the time of its execution, as entirely consummate—as a contract "*entered into*"—"made."

Then a copy of the contract, *in extenso*, is transmitted by Captain B. to the department as a consummate and binding instrument, without the remotest suggestion or hint of any condition yet to be performed in order to give it effect.

When the department comes to notice the contract, (a copy of which had been so reported and transmitted by Captain B.,) and to state objections, these objections equally exclude any inference or hypothesis of there being such a collateral condition yet to be performed as Captain B. afterwards suggested. All the objections of the department turn exclusively upon the intrinsic terms of the instrument itself; it is clear that, those objections being removed, the department viewed the contract as consummate, and unexceptionable in all other respects. A mere *penalty* was all that was thought necessary to give *binding effect* to the contract. What is there said about a *collateral bond* has no reference whatever to collateral *sureties* to the bond; it is only one of two modes proposed for giving the contract the sanction of a mere *penalty*; and either mode would equally have satisfied the department—either a penalty reserved in the body of the contract, or in a col-

lateral bond conditioned for the performance of the contract. Neither of these, the one more than the other, imports that *bondsmen* or *sureties* are required. By placing the *collateral bond* on the same footing as the mere reservation of a penalty in the body of the contract, the idea of *sureties* is absolutely excluded. Indeed, it is impossible to read Captain Smith's letter without seeing plainly that the idea of bondsmen or sureties never entered the mind of the Engineer Department.

Again: Mr. Crown, being in want of some pecuniary aid to execute the work he proposed to undertake, obtained from Mr. Leckie a loan of \$800 in anticipation of his proposals being accepted, proposing to refund the loan out of the money to be received on account of his bricks. Accordingly, Mr. Leckie, on the 2d of March, 1826, wrote a letter to Captain B. highly recommending Crown, and wishing to know whether, if he obtained the contract, Captain B. would honor his draft for the \$800; to which Captain B., on the 16th March, 1826, (the very day the contract was executed,) answers that he will "*accept and pay* the order of Mr. Crown, for the sum mentioned, or for *any other sum*, whenever he shall *deliver bricks* to the amount of the order." Now, here the mere *delivery* of bricks is made the only condition of accepting and paying the draft; and if there were really no binding contract at the time, but the whole rested upon the performance of the condition of giving bondsmen, must not Captain B. have further qualified his promise to accept and pay, by the proviso that Crown *consummated* the contract, and, in fact, became the *contractor* for the delivery of the bricks? The terms of the answer to Leckie clearly recognise Crown as contractor in fact at that time, and exclude every other qualification of the acceptance and payment of Crown's order, except that of the actual delivery of bricks *according to contract*. (See the correspondence between Captain B. and Leckie, annexed to Captain B.'s aforesaid statement to the former committee. C. D. No. 4.)

The admitted facts, already adverted to, are conclusive of themselves. Crown had, in due time, established his brick manufactory on an adequate scale; had, by the month of July, and long before Captain B. raised this difficulty about bondsmen, actually manufactured 800,000 bricks, being within 200,000 of the amount of the very *first delivery*, which, according to the contract, was to be 1,000,000 delivered on the 1st of October; so that he had taken time by the forelock, and had four-fifths of the quantity ready three or four months beforehand; he had actually delivered 5,000 of the bricks as early as *June*, four months before the time fixed for the first delivery.

Here, then, is part execution by *both parties* of a contract which had been standing, with all the *solemnities* of a consummate instrument, for more than four months, which had been officially reported, and all along acted on during that period as a consummate contract, without whisper or hint from any quarter that it depended for its *binding effect* upon any collateral condition whatever. Under these circumstances, and after all this lapse of time, the parties, one and all, would have been absolutely *estopped* (if I may use a technical term) in a court of law, to deny the consummate execution and binding force of the contract; and, therefore, all evidence of any collateral condition

about bondsmen would have been excluded; or, if such evidence had been admitted, the court would unquestionably have instructed the jury that a waiver and abandonment of the condition ought, under the circumstances, to be *presumed*. But I am clear in the opinion that, upon the strictest legal principles, such a condition, if fully proved according to the statement of Captain B., would have been nugatory and *void, ab initio*; that, independent of the circumstances of the subsequent recognition and part execution of the contract already adverted to, the supposed condition never could have operated one instant to suspend the consummation and binding effect of the contract. The soundest and most universally admitted principles of law would have forbidden it. No written contract, especially a contract under *seal*, can be, in any manner, varied or modified by setting up any *parol* contract, condition, or understanding, as collateral to it. The sealed contract is a complete *estoppel* (as the legal phrase is) to any pretence of other terms or conditions but what the contract expresses on its face, or necessarily implies by the fair construction of its terms. True, a deed may be delivered to a *third person* as an *escrow*, subject to regular delivery, *in futuro*, to the party, upon performance of a *parol* condition proved by *parol* evidence; but it never can be treated as an *escrow* after solemn execution and delivery to a *party*. Once *delivered by consent* of parties, and it can no longer be an *escrow*, but instantly becomes consummate and absolute. Here there is no pretence, or shadow of a pretence, for treating this contract as an *escrow*. It was regularly executed and delivered to the *party*; treated and acted on by both parties for more than four months as a consummate instrument; actually carried into practical effect and operation by both, and in part *performed* as a *consummate and operative* contract.

Escrow being out of the question, the whole pretence of a collateral *parol* condition about bondsmen is absolutely impertinent and nugatory.

If, however, the question could, in any manner, be made to turn on the *fact*, or on *parol* evidence of the fact, of such a condition having been originally agreed to *verbally* at the time of the execution of the contract, the fact could not be said to be satisfactorily established by the statement of Captain B.

He refers to evidence in corroboration of his statement, never to this day produced—the evidence of Lieutenant Tuttle. His statement, being the statement of a *party*, is met by the positive denial of the other party. It is inconsistent with, and most conclusively repelled by, all the facts and circumstances preceding, accompanying, and following the execution of the contract; inconsistent with all his own sayings, actings, and doings, for more than four months after the execution of the contract. The pretence is set up at a time (July or August, 1826) when he had a *new* motive and a direct interest to imagine and trump up some apology for his conduct. The contract which he had drawn and executed had been condemned by his superiors as so negligently or ignorantly drawn as to have imposed an obligation on the government to pay the price of the bricks, without any reciprocal obligation on Crown to deliver them. Manifest as was the absurdity of this notion, he had an obvious motive and an inter-

est of professional pride to clear his skirts of the gross ignorance and negligence implied by the objections to his contract urged by his superiors; and this he attempts by the almost equally absurd pretext of Crown's original stipulation to give a collateral bond, with sureties, and of a mutual understanding that the contract was to remain unconsummated and suspended from all binding effect till such bond and security were given; though he most inconsistently admits, or clearly shows, that it was in the meantime carried into practical effect and operation, without an instant's delay; as if a contract could *operate*, and be carried into execution as such, whilst it stood suspended and was no contract, but a mere *project of* contract, waiting for some act to be done before it could operate as a contract.

I say nothing of the more interested and corrupt motives attributed to him—and under a strong suspicion of which he appears to have labored at the time—of a secret participation with Potter in the profits of the contract with that person, when it was contrived to bring him in to supersede Crown in the business.

2. Captain B.'s next charge against Crown is, that of the 800,000 bricks which he admits had been manufactured between March and July, there were only 250,000 fit to pass inspection, and to be worked up in the fort.

Now, admitting for a moment this charge to be true in its terms, what does it amount to, and how may it possibly affect Crown's rights under the contract, or establish against him anything approaching a breach of contract? This immense quantity of bricks had been manufactured so early as July, at least three months *before* the time (1st October) when Crown was *bound* by the contract to deliver any bricks at all—one-third of the whole, that is, 1,000,000, being deliverable on the 1st October, one-third on the 30th November, and the remaining one-third on the 31st December. All that might be delivered any time before the 1st October, depended entirely on Crown's own option; nothing can be clearer from the terms of the contract than this—that he was not *bound* to deliver a single brick until the 1st October, 1826, but might, at his option, deliver them any time before. Then, if it were clearly proved that in July, 1826, 550,000 of the bricks then burnt were unfit to be received, he had abundance of time before the 1st October to make up the deficiency, and could be charged with no sort of default under his contract before the last named period.

But is the fact satisfactorily proved, by any means, that the bricks which Crown had ready for delivery by the month of July, 1826, were of the bad quality represented by Captain B., in the proportion of 550,000 to 800,000?

For this fact, again, we have nothing but Captain B.'s *ipse dixit*. He produces no actual *inspection* and *condemnation* of the bricks, nor any other sort of evidence to corroborate his statement; but he is most powerfully, if not conclusively, contradicted in this fact by the positive evidence of several credible and unsuspected witnesses, and by several cogent *circumstances* appearing in the case.

Alfred Emerson proves he was present when Captain B. refused to receive the bricks, and that his refusal was grounded *not* on any al-

leged defect in the *quality of the bricks*, but expressly on an alleged defect in the *contract* between him and Crown. The particular defect in the contract alleged by Captain B. is not recollected by the witness; but it must have been either the absurd one pointed out by the Engineer Department in Captain Smith's letter, or else the newly set up pretext of Captain B. himself, of the want of bondsmen.

Three other witnesses, James H. Henry, David Hepburn, and a person whose deposition was taken at Norfolk in March, 1836, Z. Hawkins, [Nos. 7, 8, 9,] all expressly prove the good quality of the bricks; and further prove the damning fact, that the very same bricks which Captain B. affects to condemn as of bad quality in the hands of Crown were immediately afterwards accepted of Potter as good bricks, and actually worked into the fort, after poor Crown had been compelled, by the chicaneries of Captain B., to sell the bricks, at a reduced price and at a cruel sacrifice, to Potter, and let him take his (Crown's) place as contractor for bricks. They further prove that these very bricks were of better quality than those afterwards manufactured by Potter, and accepted as good bricks, and worked into the fort. These three witnesses had the best opportunities of observing and knowing the facts to which they testify, as will be obvious from a reference to their depositions, and to their employment as artisans on the work. One of them, Henry, had been employed by Crown as a brickmaker in his yard, and was afterwards continued in the same employment by Potter after he took the yard. The fact, therefore, was within his personal observation and certain knowledge; he could not be under any honest mistake; the facts he proves must be true, or he perjured. So the other two witnesses, Hepburn and Hawkins, were both *bricklayers*, employed by Captain B. on the construction of the fort; their means of personal knowledge of the facts testified by them equally exclude any possible presumption of honest mistake.

General Gratiot, indeed, in his letter to the Secretary of War, dated 20th February, 1829, [see the above-cited document, No. 8, p. 2,] does make a suggestion benevolently intended to ease off Captain B. from this damning fact. "With respect," he says, "to the statement that Captain B. purchased afterwards from *Mr. Potter* the brick which he had refused to receive from *Crown*, there is no other evidence than that contained in the papers furnished by Mr. Crown; and, *without impeaching the veracity of either of the deponents to that fact*, it is evident that the one may have been *misinformed* as to the *identity* of the bricks purchased from Potter, and that the other may have worked up in the fort bricks *made by Crown*, since there is evidence of *purchases* having been made from *him* by Captain B." Now, this hypothesis, in both its branches, is purely gratuitous; nay, gratuitous as it is, General Gratiot has clearly misapprehended the force and bearing of the evidence. Henry, the first witness to whom he alludes, does not speak on *information* at all, but on personal knowledge, and obviously with the best means of personal knowledge. What ground, then, for the general's hypothesis of "*misinformation*?"

As to the other hypothesis upon which the general accounts for possible error in the evidence of the two other witnesses—namely, that the bricks of Crown's manufacture, which they speak of having

worked up in the fort, were only those which Captain B. had purchased of Crown himself, not those sold by Crown to Potter, and by him afterwards delivered to Captain B.,—it is evident the general has inadvertently fallen into some confusion and misapprehension respecting the evidence. He speaks of “evidence of *purchases* having been made from him (Crown) by Captain B.”

Now, what “evidence of purchases” can be here alluded to? The only purchase from Crown, that is, the only delivery of bricks by him, was of the small quantity of 5,000 delivered so early as the 28th of June, the month before his establishment was turned over to Potter; yet the General speaks of “*purchases*” indefinitely. It has struck me that he may possibly have been misled by some similitude in the appearance of two different names as they are written in Mr. Hagner’s statement (No. 10) of bricks purchased and paid for by Captain B., where may be seen in the same list the names of Thomas Crown and Thomas Cowan; the first being put down for 5,000 bricks delivered on the 28th June, 1826, the last for 286,000 in January, 1827, long after poor Crown had been driven off by the intrigues and chicaneries practised against him.

However this be, the least careful examination of the depositions must put it beyond the range of any moral or legal probability, and of any rational presumption, that these witnesses could have confounded the 5,000 bricks delivered by Crown in June, 1826, with those delivered by Potter after he had displaced Crown. One of them, Hepburn, was not employed on the work till November, five months after the 5,000 bricks had been delivered; and the others, though employed from the beginning—the one in the brick-yard, the other on the masonry of the fort—show, in the whole context of their evidence, too plainly to be misunderstood, that they speak, with intelligence and discrimination, of the bricks delivered by Potter after he had displaced Crown.

The statement of Mr. Hagner, just referred to, supplies matter of strong corroboration to the evidence (if it wanted corroboration) of these witnesses, as it shows that Potter had, by the 31st *July*, delivered 378,000 *hard-burnt* bricks. Now, this was almost immediately after the establishment was turned over to him, and before he could possibly have had time to manufacture and burn the bricks. [See Mr. Hagner’s statement, No. 10.]

3. The last of Captain B.’s pretexts for ousting Crown of his employment is two-fold—his want of *capacity*, and his want of *means* to carry on the work.

His industry and bodily exertions are admitted, in terms, as exemplary; his honest and persevering endeavors to perform the work are not questioned—’tis his *capacity* (meaning, I suppose, mental capacity) alone that is objected to. Now, if he had not sufficient capacity for a *brickmaker*, what could he have had any capacity for? It was a profession which he had pursued, with success and on the largest scale, for many years, and in which he had acquired the largest experience. If, in all that time and with all that experience, he had not capacity to learn such a mechanical profession, and to acquire competent skill in it, he could have had no more brains than

one of his own bricks ; absolute and hopeless idiocy, at least, must be imputed to him. The very practice and experience he is proven to have had in the business, must have evidently qualified him for the undertaking, supposing him not to be a born idiot. He had been most extensively employed in this city and other places in the very business of conducting the practical operations of brick-yards on the largest scale ; and, among other undertakings of the same kind, had manufactured the bricks for Fort Washington. Yet, with all this long and diversified experience, after the great number of most competent judges with whom he had come in contact in the course of his business had vouched his capacity and fitness, Captain B. is the very *first* and the very *last* who pretends to have detected any want of capacity.

His capacity, indeed his eminent qualifications, from long and large experience, for the business, are vouched for by numerous witnesses, themselves most competent judges and of unquestionable veracity. The late Robert Leckie alone, if all the others were out of the way, would be sufficient to annihilate the assertion of Captain B. on this point. Mr. Leckie was one of the most respectable in point of character, and one of the most skilful and best instructed of our mechanics—indeed, a general architect of respectable standing. To his are added the positive, unequivocal testimonials of many gentlemen ; some of whom from their professional pursuits as military engineers, others from their experience as employers of mechanics to furnish materials and execute brick-work, may be considered as eminently qualified to judge of the matter ; and I will, therefore, simply refer to the testimonials, before the committee, of Robert Leckie, General Gratiot, Colonel Bomford, Major Wade, Commodore Rodgers, A. B. McLane, and William A. Bradley. (Nos. 11, 12, 13, and Mr. Leckie's before-mentioned letter to Captain B., dated 2d March, 1826, annexed, as exhibit C, to Captain B.'s statement.)

Captain B.'s charge of incapacity being thus trampled under foot, the very circumstance of his having urged so groundless a complaint to his superiors against Mr. Crown sufficiently evinces his evil disposition towards the individual, and the evil motives that must have actuated him in persecuting that individual out of his lawful and proper employment in the public service.

The want of *means*, which Captain B. has coupled with the want of capacity, is a complaint equally groundless, and just as completely overwhelmed by evidence in contradiction of it as the other, and in one view, perhaps, has a more malignant aspect.

The very fact that Crown had completed his brick-yards and manufacturing establishment upon such a scale as to have 800,000 bricks manufactured and ready for delivery three months in advance of the time fixed for his first delivery of bricks under the contract, does of itself refute the complaint of inadequate means. Mr. Leckie (No. 11) proves that he entered on the business with a ready-money capital of at least 1,300 dollars, 800 of which was lent by Mr. Leckie himself, and that capital backed by a fair personal credit. When he commenced operations under the contract he found no difficulty, though a stranger, in obtaining what credit he required in anticipation of his

expected receipts on account of bricks. If he had been fairly dealt with by Captain B., he would have had abundant funds, and in full time, to discharge his engagements and keep up his credit. At the very time he was forced by the cavils, chicaneries, and intrigues of Captain B. and Potter to surrender his establishment, and was made to feel the pressure of pecuniary embarrassment, he was entitled to receive of Captain B. abundant funds to place him at ease. The 800,000 bricks, at \$7 75, should have placed at his disposal \$6,200 in ready money; and even if Captain B. were sustained, as he is most victoriously contradicted, in saying that only 250,000 of that quantity of bricks were fit to be received under the contract, even then the \$1,937 50, which, without any dispute, he was entitled to for the latter quantity, would have enabled him to prosecute the work with credit and advantage. But the evidence is positive and clear that Captain B., in July, refused to receive any of the bricks, but insisted on Crown's selling out to Potter.

Then the very embarrassments brought suddenly upon Mr. Crown, and the only want of means or credit ever manifested in the course of his operations, were all the direct effects of Captain B.'s chicanery and oppression; and he has the grace to set up the *consequences* of his own misconduct as the apology for that very misconduct, and as *criminator* of the *victim* of that misconduct.

I do not think it at all material to trouble the committee with any remarks upon any of the points in the case; but these general principles of the law of contract, and of the evidence by which the execution of the contract and the excuses for the breach of it, should be determined.

The evidence of Mr. Leckie and others will supply the data whereby to estimate the losses of the claimant, or the equitable compensations that ought, *ex equo and bono*, to be awarded him.

W. JONES.

FEBRUARY 20, 1837.

No. 2.

OAK ISLAND, N. C., *March* 23, 1830.

SIR: In answer to your letter of the 11th instant, I now enclose the original contract entered into between Mr. Thomas Crown and myself, for the delivery of three million of bricks for the fortifications under my superintendence at this place, marked A. This is the copy of the contract which was forwarded by me to the chief engineer, and which was not sanctioned or approved by him. The letter marked B is a copy of one received from Captain J. L. Smith, who was then the assistant to the chief engineer, and contains the objections held by the Engineer Department to the contract. It is proper to observe in this place that no penalty was expressed in the contract, because it was intended to send a bond with it, but which was not done, owing to the delay of Mr. Crown to name his bondsmen. About the middle of July, 1826, four months after the contract was entered into, Mr.

Crown named as his securities Col. Bomford and Major Wade, of the United States army, neither of whom, however, had, as I understood from them afterwards, ever given him any authority to do so. It was distinctly understood by Mr. Crown that the contract was not to be considered binding on either party until security was given by him for its faithful performance.

Having obtained leave of absence for a short period, I met Mr. Crown in Fayetteville, either the last of March or early in the month of April, 1826, on his way from Washington city to Smithville, for the purpose of commencing the brick-making business; and in a conversation which I had with him at that time, he stated to me that his means were ample; that he had made an arrangement with the Branch Bank of the United States at Washington to discount his paper, and that he could procure from that institution funds enough to enable him to go on with the contract. I beg leave to refer to the paper marked C, and my answer thereto, marked D. He also stated to me that he had sent by water fifty or one hundred laborers, (negroes,) with provisions to last them at least six months, when the truth was that he had four men and one boy only, and not over one month's provisions for that limited force. These facts were made known to me while I was in Philadelphia by Lieutenant Tuttle, of the corps of engineers, who was then my assistant. He declared his belief of Crown's inability to perform his contract for the want of capital to employ the requisite force.

About the 20th of June, 1826, I returned to my station, and soon after visited Crown's brick-yard, to make an inspection of his work, and to satisfy myself of the probability of his being able to manufacture the number of brick which he had contracted to deliver. I found that, instead of the brick being manufactured of *pure clay*, as was to have been done, agreeably to the directions given to Crown by myself and Lieut. Tuttle, he was making them of a mixture of loam, clay, and sand; and that, out of one or two kilns which he had burnt, there was nearly a total loss, 5,000 only being of a quality fit to be received. These were received, and Crown was paid for them at the rate stipulated in the contract, (E,) though I did not conceive myself to be bound to receive one single brick until security had been given for its faithful performance, and until the contract should be approved by the chief engineer.

Crown became much embarrassed in his circumstances, and applied to me for an advance of \$1,000 to \$1,500, which it was not in my power to comply with, as the law prohibits advances on contracts; and on the 31st July or 1st August, 1826, he, without advice or persuasion on my part, came forward and voluntarily relinquished his contract. The letter of Capt. Smith, (marked B,) returning the contract, was written on the 26th July, 1826, and received here on the 5th August, 1826. Crown relinquished the contract on the 1st of August, 1826, and *knew nothing of the objection urged against the contract until I informed him thereof, four or five days after its relinquishment.* When Crown came forward and relinquished the contract, he stated his reasons for doing so, and, to the best of my recollection, they were as follows: That he could not get bondsmen, and that he

had no means of his own to enable him to pay his hands, and such other expenses as were necessary. This explains why another contract was not drawn, free from the objections entertained by the Engineer Department to the one which had been entered into.

Relative to the non-reception of Crown's brick, it is not true that I refused to receive the brick which he had made. The number stated in my letter to the chief engineer is an error; 500,000 should have been the number in lieu of 800,000. I did receive 5,000 from him, and that is the whole number which he ever delivered here. I did refuse, however, to advance him the sum that he wanted, and receive the brick at the yard; and my reason for doing so was, that the contract stipulated that they were to be delivered by Crown at Oak island. If I had consented to have received them at the yard, it would have been a breach of contract; and, besides, Mr. Potter, to whom Crown owed a considerable sum for advances made to him, would not let them be removed until Crown gave him security for the sum which he owed him. This is the true reason why Crown did not deliver them.

The day on which Crown gave up the contract, or a day or two after, he called on me, and informed me that he had endeavored to sell what brick he had on hand to Mr. John K. Holmes, who was prevented, I understood him to say, from closing the bargain, in consequence of Mr. Potter refusing to let the brick be removed from his land until he (Crown) should pay for the advances made to him in money and labor by Potter. He told me that he would try to effect a settlement with Potter; and not long afterwards came into my office with Mr. Potter, and told me that the bricks were disposed of to him, for the purpose of enabling him (Crown) to close all his business previously to his leaving this section of country. The only difficulty in the final settlement of their accounts was the price which I was to allow Potter for the brick, as there was a risk in Potter's taking the brick and selling them for the price which Crown was to have received by the contract, viz: \$7 75 per thousand.

On a full consultation with the parties, in which Lieutenant Tuttle, of the corps of engineers, then my assistant, participated, it was determined to allow Potter \$8 50 per thousand for all the good brick. This price was fixed upon with the full approbation of Mr. Crown, and with a view to his benefit alone, for it enabled him to pay Potter all he owed him, and to receive a sum of money (the amount not known by me) from Potter. Crown expressed his gratitude for the liberality which I had manifested towards him. Out of these brick Potter delivered about 250,000.

Previous to this transaction, nearly a million of small brick had been purchased of Potter by Lieutenant Tuttle before I came here. These brick contained sixty-four cubic inches each, for which \$7 50 per thousand was paid, by the express authority of the chief engineer. These small brick were made the basis of calculation for establishing the price of those which Crown had sold to Potter, containing eighty-three cubic inches, and which, at the same rate of the small brick, would have been worth \$9 72.6 per thousand. Crown, himself, proposed that I should allow Potter \$9 per thousand for them.

The only contract that I have had for the delivery of bricks at Oak island was the one with Crown. He did not transfer that contract to any person whatever. He gave it up unconditionally, and for the reasons before stated. All the brick, except those referred to above, which have been used in the work, have been purchased without a contract, and have varied in price from \$4 to \$10 per thousand, according to size and quality.

You request me to state what assistance I rendered to Crown. The payment to him for the 5,000 bricks, when it strictly should have been made to Mr. Leckie, of Washington, and to whom I conceived myself individually responsible for the amount, (\$86 75), is one instance. Permitting him to proceed at all with his contract after he deceived me as to his means of carrying it on, or until the security for its performance was given, is another instance. Also, in the settlement of a difficulty between him and Potter, when I inspected the brick-yard, by which Crown was saved the mortification of being driven off from the brick-yard by Potter, who had called his negroes for that purpose.

I have the honor to be, very respectfully, your most obedient servant,

GEO. BLANEY,
Captain Corps of Engineers.

Hon. RUFUS MCINTIRE,
Of the Committee of Claims, &c., &c.

Sworn to before me.

SAM. POTTER, *J. P.*

No. 3.

A.

Articles of agreement made at Smithville, North Carolina, on the sixteenth day of March, in the year of our Lord one thousand eight hundred and twenty-six, between George Blaney, captain of the United States corps of engineers, superintending the construction of the fortification at Oak island, near the mouth of the Cape Fear river, in the State of North Carolina, of the one part, and Thomas Crown, of Shepherdstown, in the State of Virginia, of the other part.

This agreement witnesseth, that the said George Blaney, for and in behalf of the United States of America, and the said Thomas Crown, his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree to and with each other, as follows, to wit:

1st. That the said Thomas Crown, his heirs, executors, or administrators, shall deliver at the United States wharf at Oak island, near the mouth of Cape Fear river, three million bricks, in the manner following, to wit:

One million on or before the first day of October, 1826; one million on or before the thirtieth day of November, 1826; and the re-

maining one million on or before the thirty-first day of December, 1826.

2d. That the said three million brick shall be manufactured of such clay as shall be approved by the engineer superintending the fortifications at Oak island, and shall be made in moulds of the standard size adopted by the corporation of the city of Washington; that is to say, the brick, when moulded, shall measure nine and one-eighth inches in length, four and five-eighth inches in breadth, and two and five-eighth inches in thickness.

3d. That the said three million brick shall be all hard-burnt, and shall be subject, on inspection, to approval or rejection by an officer of engineers, or such person as shall be appointed by the superintending engineer of the fortifications constructing at Oak island, for that purpose.

4th. That the said Thomas Crown, his heirs, executors, or administrators, shall be entitled to receive from the United States, through the hands of said George Blaney, or such other officer of the United States as shall be duly authorized, for the brick delivered by virtue of this contract, the sum of twenty-three thousand two hundred and fifty dollars, lawful money of the United States, being at the rate of seven dollars and seventy-five cents for each and every thousand brick.

5th. That the said Thomas Crown, his heirs, executors, or administrators, shall be entitled to receive from the United States, in the manner stipulated in the preceding article, on the delivery of any part of the said three million of brick which shall have been inspected and approved by the person designated by the superintending engineer of the fortifications constructing at Oak island, a sum corresponding with the quantity actually delivered, at the rate established in the foregoing stipulation.

In testimony whereof, we have hereunto affixed our hands and seals the day above written.

GEO. BLANEY, *Capt. Eng's.* [L. s.]
THOMAS CROWN. [L. s.]

Signed, sealed, and delivered in presence of—

JOHN H. HOLMES.

JOHN BROWN.

It is understood that the United States are to furnish hands to receive the brick as they shall be tossed or thrown from the vessel by the contractor.

GEO. BLANEY, *Capt. Eng's.*

No. 4.

SMITHVILLE, *March 22, 1830.*

Having been called on by Captain George Blaney, and requested to state in writing what I recollect of a contract made between him

and a Mr. Thomas Crown, and all the circumstances connected therewith, they were, to the best of my knowledge, as follows:

Some time in the winter of 1826, Mr. Crown arrived at Smithville; made a contract with Captain Blaney to make and deliver a large quantity of bricks the next summer—the quantity not recollected certainly, but perhaps three millions, or upwards; the said Crown visited my brick-yard, and agreed with me that the brick should be made there, on such terms as we should think equitable and right, saying that he would return to Washington city, where he had at his command all things necessary for the completion of the contract, and that in April he would return to this place with all things needful, as above stated. During his absence I employed what hands I had in cutting wood and digging clay, and such other work as was needful to prepare for the season. In the early part of April, Captain Blaney left this place for the north, and about the same time Mr. Crown arrived; but not, as he had promised, with forty or fifty hands, a year's provisions, &c., &c. He had only four men and a boy, a small quantity of provisions, and, from good authority, I believe not more than \$100 in cash. This circumstance alarmed me; but, as Captain B. was absent, I would not refuse Mr. C. the chance of making the bricks at my yard, as in fact there was no other place in this vicinity where they could be made at any fair price. I therefore agreed with Mr. C. to give him up the yard, with all the apparatus thereto belonging, together with all the wood I had cut, (500 cords,) with the privilege of cutting and burning as much more as would be necessary for three million bricks, for the sum, as well as I can recollect, of \$3,500, and also to hire my negroes. In pursuance of which, charge of the yard and hands were given up to him, the said Crown.

It was in vain that Mr. C. endeavored to procure the number and description of hands required to carry on the business, and most that he was able to get remained with him for a short time before they became dissatisfied and left him. He commenced burning a kiln of bricks of near 100,000, early in the progress of which it appeared to all who witnessed his management that he knew but little about the business he had undertaken, which was fully proved at the opening of the kiln; for out of it he got but five thousand bricks which would pass inspection. By this time every circumstance seemed to portend an unfavorable issue; and my interest being deeply involved, I watched with great anxiety the return of Captain B., believing that he would immediately avail himself of the circumstance of Crown's not having furnished the security required by the contract, to declare the same null and void; but to my surprise and regret, on Captain B.'s arrival, (I think in June,) he still appeared to retain some confidence in Crown; in consequence of which, he was allowed to go on until the latter part of July, previous to which, seeing his success impracticable, I resolved to make him no further advances. His money had been long before exhausted; his stores nearly so, and his credit entirely so; and, with all, his health prostrated, and he involved in debt. On which, (as I understood,) he requested of Captain B. an advancement of money, or a release from the contract; the latter of which was preferred by Captain B. It was then impossible that Mr. Crown could

pay off his debts, unless he could get some money. I was then in advance, at a fair calculation, from five to six hundred dollars. He had by this time burnt three kilns more of bricks, which had not yet been opened, but were judged to be but little better than the first; the whole quantity which were then on hand being about four hundred thousand, of which Captain B., in order to get rid of Mr. Crown, promised me that he would take all that he could possibly make do, at a small advance on the price which Crown was to have had, if I would advance to Crown \$600, which he said was the least he could do with. I was obliged to do so, for my brick-yard, hands, &c., were, as things then stood, a sinking business to me. I went on to deliver the bricks which Crown had given up to me, and Captain B. received near three hundred thousand, of which a large quantity were salmon bricks, and but few such, if any, as Captain B. has required of me ever since.

From a reasonable calculation, by the waste of wood, clay, &c., which were prepared for the season's work, and which could not be replaced in time to enable me to repair or to redeem the lost time, together with my negro-hire and advance of money, I consider that I was injured at least \$1,000 by Mr. Crown.

The foregoing is, to the best of my memory, a true statement of facts, as clearly as I am able to set them forth.

SAM'L POTTER.

No. 5.

TREASURY DEPARTMENT,
Third Auditor's Office, March 1, 1830.

SIR: At the request of Mr. Crown, and by direction of the Secretary of War, I have the honor to inform you that it further appears from the account of Captain George Blaney, the officer disbursing at Oak island, North Carolina, the following payments were made to Samuel Potter and Hayne & Potter, for bricks delivered there between the 10th of August, 1826, and 10th of August, 1827:

1826.			
Dec. 27.	Samuel Potter, for 264,689 bricks, at \$7 50.....	\$1,985 16	
	Same.....244,590 bricks, at 8 50.....	2,079 01	
	Same.....26,960 salmon, at 4 00.....	107 84	
Dec. 30.	Same.....16,008 bricks, at 8 50.....	136 07	
1827.			
Feb. 26.	Same.....334,879 bricks, at 8 50.....	2,846 47	
April 18.	Hayne & Potter, for 59,720 soft, at 4 00.....	238 88	
May 30.	Same.....455,998 hard, at 8 50.....	3,875 97	
June 30.	Same.....107,840 hard, at 8 50.....	933 64	
July 31.	Same.....173,500 hard, at 8 50.....	1,474 75	
	Same.....25,080 hard, second quality, at \$6.....	150 48	

Respectfully, your obedient servant,

PETER HAGNER, *Auditor.*

Hon. E. WHITTLESEY, *House of Representatives.*

No. 6.

ENGINEER DEPARTMENT,
Washington, March 2, 1846.

SIR: Your communication of the 27th ultimo, making several inquiries in regard to contracts entered into by officers under the control of the Engineer Bureau, and requesting information in the particular case of a contract with Thomas Crown, has been received, and, in reply, I have the honor to give the following answers to the questions therein propounded:

1st. Whether contracts made by officers under the control of your bureau must, "in all cases, be approved by the bureau, or by the department, in order to make them binding upon the United States?"

In all cases of contracts made by officers under the control of this department, the contract must be sanctioned by the Chief Engineer, in order that such contract may be binding upon the United States. The words of the existing regulation on the subject are: "No contract will be binding upon the United States, or will go into operation, until it has been sanctioned by the Chief Engineer."

2d. "Is the case of Thomas Crown an exception to this rule, or was an approval of his contract *indispensable* under the usages and instructions of the department, to its completion?" "Are all contracts considered *inchoate* until approved?"

The usages and instructions of the Engineer Department have been uniform in this respect since February, 1840, the date of the present regulations, requiring in all cases a compliance with the requisitions of said regulations. The regulations in force at the time of Mr. Crown's contract required that when the contracts were made they must be reported to the Engineer Department, "accompanied by a list of the proposals, and a certificate declaring them to have been made on the most reasonable terms that could be procured; and copies of all contracts so made must be forwarded to the Engineer Department."

And it appears, on reference to a letter from this department, signed by Captain J. L. Smith, of July 26, 1826, (a copy of which is found in House document No. 8, 21st Congress, 1st session,) that it was then the usage of the department to disapprove contracts thus transmitted for its examination, when they were not deemed to guard sufficiently the interests of the United States. It seems to me the action of the department, in pronouncing that contract a "nullity," is unequivocal as to the understanding it had of its own powers over contracts in that condition.

3d. "The committee also desire to know upon what grounds the bureau predicated its rejection of the claim?"

It would appear, from this interrogatory, to be the opinion of the committee that Mr. Crown had, under his contract, addressed a claim to this bureau, which had been rejected—the grounds for such objection being now asked for by the committee. I have caused diligent search to be made through our records up to the 1st of January, 1830,

(a day later than that on which the Secretary of War reported the case back to the House,) without finding any evidence of such claim.

As to the view taken at that day by the Engineer Department, of the circumstances of this case, we have found no other evidence or facts than are explained in, or to be inferred from, the printed documents before referred to.

I am, very respectfully, sir, your most obedient,

JOS. G. TOTTEN,
Colonel and Chief Engineer.

Hon. J. WATKINS LIGON,
Committee of Claims, House of Representatives.

No. 7.

ENGINEER DEPARTMENT,
Washington, March 18, 1846.

SIR: Your letter of yesterday, enclosing the contract of Thomas Crown, and making, in behalf of the Committee of Claims, the inquiries whether or not the contract is "drawn up in the same manner or form, and stated in the same terms and substance, that contracts for similar work under your department are usually drawn," and whether or not the contract "is such as the practice of the department has usually sanctioned," has been this day received.

Upon an examination of Mr. Crown's contract, I find it to be deficient in the following particulars, viz:

1st. It contains no certificate, by the officer, that the contract was entered into on the most favorable terms that could be procured. This certificate was required by the regulations in existence in 1826.

2d. Contracts cannot now be transferred, either in whole or in part, and must contain a statement to that effect. This does not appear to have been the case in 1826.

3d. Contracts either contain, or must be accompanied by, some provision guarantying the full and faithful performance, by the contractor, of all the stipulations of the contract. This is done either by taking the contractor's bond, with security, or by retaining from the periodical payments a certain per centage of the amount due. This usage seems to have been enforced in 1826, as would appear from an inspection of the contracts of that period, as well as from the correspondence of the Engineer Department in relation to the very contract now under consideration.

4th. Many contracts entered into about the period of 1826, as well as those of the present date, contain a provision stating that the contract is not binding upon the United States until approved by the War Department or by the Chief Engineer; and, even though the contract contained no such express provision, still it would not now be considered binding without such approval; nor is it doubted that such approval was in 1826 considered necessary to the validity of contracts.

5th. In every contract there must be inserted an express provision that no member of Congress shall be admitted to any share or part thereof, or to any benefit to arise therefrom. (See act of April 21, 1808, section 3.) This provision of the law appears not to have been enforced about the time that Mr. Crown's contract was prepared. Its non-observance was perhaps owing to the fact that its existence was at that time unknown.

Mr. Crown's contract is returned herewith.

I have the honor to be, very respectfully, your most obedient,

JOS. G. TOTTEN,
Colonel and Chief Engineer.

Hon. T. W. LIGON,
House of Representatives.

No. 8.

WASHINGTON, *December 23, 1835.*

SIR: In compliance with your request, I will briefly note my recollection of one or two facts connected with your engagement in 1826 to furnish bricks at Oak island, North Carolina, and I do so more cheerfully in consequence of having been one of the persons who recommended you for the employment.

In my recommendation, which was at the time supported by several persons of the most respectable character, I stated that independent of your experience in brick-making, you furnished the materials and erected several houses for me; and that, in every instance, you had fulfilled your engagements promptly and to my entire satisfaction.

Some time after this recommendation, and after I had been informed of your having obtained a contract, application was made to me, I think either by or through Captain Blaney, to know whether I would become one of your sureties; and to which I answered that I could not, consistent with a fixed determination, which was, while in office to avoid any connexion with public contracts; but that, under other circumstances, I should not have the slightest objection.

With esteem, sir, your humble servant,

GEORGE BOMFORD.

To THOMAS CROWN.

No. 9.

ENGINEER DEPARTMENT, *February 10, 1846.*

In entering into contracts with individuals for the execution of work, delivery of materials, &c., it is customary with this department to retain from the occasional payments made to such contractors, a per centage of the amount due, (usually about 20 per cent.,) which

is retained in the hands of the government as a guarantee for the faithful execution and completion of the contract; or to require of such contractors bond, with security, for the faithful execution of their contracts.

Where a per centage is retained, as above, the retained amount is, of course, paid over to the contractor upon the satisfactory completion of his contract.

J. G. TOTTEN,
Colonel and Chief Engineer.

Hon. T. W. LIGON,
House of Representatives.

No. 10.

WASHINGTON, *January 30, 1836.*

I have known Mr. Thomas Crown as a brick-maker for several years, and believe him well qualified to manage that business. In 1829 and 1830 he delivered bricks at Fort Monroe, Virginia, which were approved of as bricks of good quality, and suitable for permanent building.

A. B. McLEAN.

To whom this may concern :
W. A. BRADLEY.

We agree with Mr. McLean in respect to the opinion he has given of Mr. Thomas Crown as a brick-maker.

JNO. RODGERS.
C. GRATIOT,
Brig. General.

No. 11.

WASHINGTON, *January, 1828.*

Mr. Thomas Crown was employed in the erection of the United States arsenal near Pittsburg, Pennsylvania, as master brick-layer, in the years 1814, 1815, and 1816. He performed nearly all the brick-work of that extensive establishment by contract; and the work was executed in a satisfactory manner, as respects both its quality and the promptness of performance.

I state these facts from personal knowledge, as I was stationed at that post at the time, and was engaged in the supervision of the work.

W. WADE,
Major U. S. Army.

Having employed Thomas Crown in the execution of several pieces of work, I generally found him to be highly attentive and prompt in the performance of his engagements with me.

G. BOMFORD.

WASHINGTON CITY, *February 1, 1830.*

I hereby certify that I was employed by Thomas Crown as a brick-moulder at Smithville, North Carolina, to assist him in moulding bricks for the fortifications at Oak island, in 1826. I am under the impression that he had between eight and ten hundred thousand bricks made and burnt. I am confident there were not less than two-thirds that were of the best quality of bricks, which were worked into the fortifications. However, it appears there was a contract made between Captain G. Blaney and Mr. Crown, when it appears the contract, being sent to the Engineer Department, was returned without being executed, from what cause I know not; but so it was. Captain Blaney would not receive the bricks that Mr. Brown had made; and he (Mr. Crown) could raise no money to continue on the the work, being a stranger in that country. I had no funds to continue the work. He had hired hands of a Mr. Potter in that country, and he also furnished ground for Mr. Crown to make the bricks on, for which Mr. Crown was to compensate him. It further appears that, after Captain Blaney would not receive the bricks, Mr. Potter observed he would purchase them of Mr. Crown, at a very reduced price, perhaps at one-fourth of the value; and if he would not take his offer, he would attach the same to secure himself, as there was no person in that country that was able to purchase them except for government. Mr. Potter being a wealthy man, and who Captain Blaney boarded with, I have no doubt but there was an arrangement made between those two gentlemen. It also appears that Mr. Potter was an applicant for the contract previous to Mr. Crown's getting it. I will state one circumstance, previous to the latter taking place: That Captain Blaney and Mr. Potter came to Mr. Crown's brick-yards together, and he (Potter) said, in the presence of Captain Blaney, that if said Crown did not consider him as a partner in the business, that he would call his negroes together and put him across the creek. There was considerable confusion took place, which had mysterious appearances. At length, Mr. Crown, from the repeated propositions of Potter, was obliged to sell out his establishment and brick at a great sacrifice, and returned home. I continued to work with Potter the balance of the season; and the bricks made by T. Crown were purchased from Potter at a price not less than from seven and a half to eight dollars per thousand, and worked in the fortifications at Oak island; and those were as good bricks as I have ever seen in any part of this country; and I am under the impression that Mr. Crown could not have received more than two dollars per thousand for the bricks, under the compulsory means then pressed upon him. I am under the impression that if Captain Blaney had received the bricks made by Mr. Crown, that he would have completed the contract without the least difficulty.

JAMES H. HENRY.

DISTRICT OF COLUMBIA, }
Washington County. } ss.

Personally appeared before me, the subscriber, a justice of the peace in and for said county, James H. Henry, and made oath on the Holy Evangeiy of Almighty God, that the within statement of facts is just and true, as they are stated, and was a witness to all the circumstances as related in the within; and further this deponent saith not.

Given under my hand and seal, this 4th day of February, 1830.

HENRY WERTZ, Jr. [SEAL.]

Having been called on by Mr. Thomas Crown, after charging my memory with what occurred at Oak island, North Carolina, between Mr. T. Crown and Captain George Blaney, in the year 1826, I think some time in the month of August, I fell in company at Captain Blaney's office, or at the door, and I heard Mr. Crown state to Captain Blaney that he would wish him to enter into a new contract, or receive his brick that said Crown had made under the contract; and Captain G. Blaney stated that the contract had been returned, not having been met with security, or something to that amount; but he (Captain Blaney) alleged that Crown had better sell them to Samuel Potter, as he had means sufficient to buy them; or may be it might be better for Crown to take Potter into partnership with him; but he (Blaney) stated that he would not receive them from Crown. I was two or three times at the brick-yard where Crown made the bricks, and he certainly had gone to a great deal of expense for erecting yards, kilns, sheds, &c.; and I should think he had made and burnt from seven to eight hundred thousand bricks, for which, I understood, he received from Potter a very reduced price. What it was I do not know; but was informed that his losses must have been not short of from three to four thousand dollars. I afterwards assisted in working the same bricks in the fort, and found them as good, if not better, than any other bricks received in the fort; but there was strong suspicion that Blaney was concerned with Potter in that transaction; but to my own knowledge I know that Crown pressed hard on Blaney to receive his bricks and enter into a new contract, as Crown informed him that he was deficient of means to proceed farther, and it would be a ruinous thing to the said Crown. I recollect well that Blaney told Crown that his papers and voucher had been sent back from Washington, and he would make no more contracts, but purchase them from whom he pleased. There is one other circumstance of a number of blacks being hired from their masters in the country to work as laborers in the fort, and drew their own rations, and received a high price; and it was also said that Captain Blaney received a part of the profits. From certain circumstances, I believe it to be the fact, for he got rich fast.

Z. H. HAWKINS.

The foregoing certificate was sworn to before me, this 10th of March, 1836.

THOMAS WILLIAMSON,
Alderman, Borough of Norfolk.

DISTRICT OF COLUMBIA, }
 Washington County } ss.

Appears before me, a justice of the peace in and for this county, David Hepburn, a competent witness, and made oath on the Holy Evangely of Almighty God, that he was employed by Captain George Blaney, from Fortress Monroe, to go to North Carolina, in the month of November, 1826, to work at his trade as bricklayer on a fort at Oak island, in the said State, under the direction of the said Captain George Blaney; and that he did work into the said fort bricks that he found there and was informed were made by Thomas Crown; and the said bricks were, in size, about the same made in the city of Washington.

Given under my hand and seal this 31st of January, 1828.

JOHN CHALMERS. [L. s.]

HOUSE OF REPRESENTATIVES—*April 11, 1850.*

The Committee of Claims, to whom was referred the petition of Thomas Crown, report:

The committee have examined this claim with considerable care, and are of opinion that the bill heretofore reported from this committee ought to pass. The former report upon the claim is adopted and made a part of this, and a bill (being a copy of one reported at the last Congress, and not acted upon from want of time) heretofore reported for the relief of the petitioner.

HOUSE OF REPRESENTATIVES—*May 5, 1846.*

The Committee of Claims, to whom was referred the memorial of Thomas Crown, report:

The memorialist states, that in 1826 he made a contract with Capt. George Blaney, acting for the government of the United States, for the delivery of 3,000,000 bricks at Oak island, on the Cape Fear river, in North Carolina—viz: 1,000,000 on or before the 1st of October, 1826, 1,000,000 on or before the 1st of November, and 1,000,000 on or before the 31st of December, 1826—to be used in the construction of the fortification at that place, for which he was to receive \$23,250, being at the rate of \$7 75 per thousand, and that he was to be paid as the bricks, or any part of them, were delivered; that he immediately made the necessary arrangements and preparations, which subjected him to considerable expense, and commenced the making of the bricks according to his contract; that in July he was prepared to deliver 800,000 bricks, and did deliver 5,000, and would have been able to fulfil his contract to the letter and spirit, but for the interference of the said Captain

Blaney, and his refusal to receive the bricks; that he was compelled by Blaney to sell the bricks which he had made to a man named Potter, and relinquish his contract; and that the same bricks were afterwards received from Potter by the said Blaney, and used in the construction of the fortification. These facts are sufficiently proved by the testimony, and the violation of the contract on the part of the government is established. The question of damage alone remains to be adjudicated. Crown states that he sustained damage to the amount of \$6,000, but he offers no proof of the amount for which he sold the bricks to Potter which the engineer had refused to receive from him, and afterwards received from Potter, and had worked into the fortification. The difference between the price he received from Potter and the contract price, should be the measure of the damages upon this point. It appears that he had made between 800,000 and 1,000,000 of bricks, 5,000 of which had been delivered, and that he sold the remainder to Potter, who sold them to Captain Blaney. The proof is not conclusive that Potter sold all to Captain Blaney, but there is sufficient evidence that the bricks made by Crown were as good as any that were used in the fortification, and should have been received. There is no proof of the amount paid by Potter to Crown for those bricks, and the committee are left to conjecture as to the amount of damage thereby sustained. But it is stated upon oath that he (Crown) received but \$600, and that his actual loss was \$6,000. If he received but \$600 for the bricks sold to Potter, it is reasonable to suppose that that sum, and the loss, with the interest upon the amount, would now be much more.

The committee have thought proper to order that the principal documents should be appended to the report, for the consideration of the House. A bill for the relief of the petitioner is herewith reported to the House.

No. 1.

Case of Thomas Crown, upon his contract with Captain Blaney, superintending engineer, to deliver the bricks requisite for constructing the fort at Oak island.

Certain questions touching the law of contract, and presenting an obstacle at the threshold to the liquidation of Mr. Crown's claim under this contract, are alone submitted to my consideration for a professional opinion.

The general authority of Captain Blaney, as superintending engineer, to contract for the work and materials requisite for the construction of the fort, seems undisputed and indisputable. But the objections to the claim are, first, such as originated with the Engineer Department itself, going to assert the *nullity* of the contract itself on its face, in consequence of supposed defects and vices in its frame and terms; secondly, objections and difficulties originating with Captain Blaney himself, after he found it expedient to devise apologies and excuses for breaking up the contract and dismissing Crown from employment.

The two sets of objections are wholly distinct from each other. Those raised at the department were, of course, never thought of or imagined by Captain B., but go to supersede and annul his act, because of his supposed want of skill to frame a sufficient and valid contract. Those subsequently raised by him were equally new to his superiors, and do not appear ever to have been thought of at the department till suggested to it by him, after he received its objections to the frame of his contract, and had been supplied with other motives for ridding himself of all connexion with Crown.

The contract was solemnly executed, pursuant to preliminary proposals, made and accepted on the 16th March, 1826. It was not till more than four months thereafter, nor till after Crown had, at vast expense, entered upon the actual performance of the contract, laid out his capital in expensive and laborious preparations adequate to the complete execution of his undertaking, and actually delivered *in advance* a portion of the bricks contracted for, that the notable discovery is made at the department, and thence communicated to Captain B., in a letter from Captain Smith, dated July 26, 1826, of such fatal defects and vices in the frame of the contract itself as gave it a one-sided operation—such an operation, in short, as bound the government to pay the stipulated price of the bricks, delivered or not delivered, without any reciprocal legal obligation on Crown to deliver the article for which he was to receive payment! So far as Captain B.'s skill as a conveyancer is in question, it seems to me that it would have required far more skill to have drawn a contract with this one-sided operation than one of mutual obligation. Our wonder, at the first blush of such an objection to the contract, is raised to utter astonishment upon a simple reading of its terms; where it is seen at once that Crown distinctly and positively covenants for the delivery of the entire quantity of bricks in several parcels and at specified times; that the size and quality of the bricks are carefully prescribed, with an express provision for subjecting them to an *inspection* from a government agent before they shall be received and paid for; and that the *actual delivery* of bricks of the prescribed size and quality, and so passing inspection, is made a *condition precedent* to the payments stipulated on the part of the government. The most skilful and experienced of professional scriveners could not have devised a contract of more complete reciprocity in its terms, nor have made the payments stipulated for on the part of the government more absolutely dependent on the condition precedent of performance on the part of Crown.

If astonishment go so far as to raise a doubt in one's mind whether the Engineer Department could have gravely put such a construction on the contract, the above-cited communication from Captain Smith needs but a careful examination to see this objection, of the want of reciprocity, and of the one-sided operation of the contract, there broadly, distinctly, and unequivocally stated and urged, to the effect of making out the contract a nullity *ab initio*. I could scarce credit the first impression on my own senses from Captain Smith's letter; and it was only after repeated and more careful perusal that I found myself compelled to yield to its too plain and unequivocal import. (See Doc. No. 8, 21st Congress, 1st session, page 5.)

The only reason for this strange deduction from the terms of the contract is distinctly stated, and hinges merely and exclusively on the omission of a *pecuniary penalty* or *forfeiture* to be exacted of Crown in case of his failure to comply with the contract. A pecuniary penalty or forfeiture, reserved either in the body of the contract itself or in a collateral bond conditioned for the performance of the contract under a certain penalty, is distinctly assumed as indispensably necessary to give the contract a *binding effect* on Crown, and to afford the government a legal remedy against him for any breach of contract he might commit, and as equally necessary to protect the government from a one-sided operation of the contract, binding them to pay the stipulated price of the bricks, whether delivered according to contract or not. I need not insist on the strange ignorance of the obvious and familiar law of contract that this motion argues, nor upon the equal efficacy of a simple covenant, without as with a penal sanction. It would be equally superfluous to attempt, at this time of day, to instruct any well-informed man, in or out of the profession of the law, how utterly useless such penalties have become. Even in the strictness of ancient times, where they were recoverable at law, the courts of equity always interposed to relieve against them, upon just compensation being made for the breach of contract. But the time has long passed since they were recoverable even in strict law. The only effect of the penalty is to give the party grieved an option between two forms of action—debt and covenant; and in either form of action the result is precisely the same—a mere recovery to the amount of the *actual damage* sustained by the breach of contract. The penalty is now universally liquidated by an assessment of the actual damage; and such assessment must be precisely the same, whether the form of the action be debt or covenant.

A minor objection to the mere detail of the contract is stated in the said letter from the Engineer Department—something about the aid to be furnished by the government in the reception of the bricks being too *indefinitely stated*. The bearing or importance of this objection is not perceived. But it is not started as one at all affecting the validity of the contract; and if there were anything material in it originally, it was rather too late to think of it after the contract had been more than four months in actual operation, and in a regular course of practical execution. It seems never to have entered the mind of the Engineer Department that any of these objections went to the monstrous injustice of a total renunciation of the contract, and of a discharge of the contractor from public employ. The aforesaid communication from the department, signed by Captain Smith, concludes with a recommendation that, "the contract, as it is, being a *nullity*, it will be necessary to *modify* it to make it *binding*, or, perhaps, it would be better to make a new one;" and, in truth, Mr. Crown never thought of making any difficulty about a modification and reform in the terms of the contract in the particulars indicated in the communication from the Engineer Department; though clearly not bound, at that period and under the then circumstances of the parties, to submit to any arbitrary modification, he was ready without hesitation to acquiesce; he had no objection to the annexation of a

penalty in either of the forms proposed, nor to a more definite stipulation about the aid to be afforded in the delivery of the bricks. No difficulty whatever arose upon either of those points. But *new and before unthought-of* difficulties were raised by Captain B. after he received the above-mentioned communication from the department, and eventuated in driving Mr. Crown from his undertaking, and compelling him to abandon his contract, in order to get rid of the embarrassments and difficulties thrown in his way by Captain B.

This brings us to the more particular consideration of the new difficulties and objections started by Captain B. in July and August, 1826, and then started for the first time, soon after he had received the communication from the department condemning the frame of the contract. These are found originally stated in an official report from Captain B. to the Engineer Department, dated August 9, 1826. (See the above-cited Doc. No. 8, pages 3 and 4.) The same topics are reiterated, with some variation and considerable aggravation, and transmitted by him some years afterwards to the then chairman of the Committee of Claims, Mr. McIntire, with the original contract and some other documents thereto annexed, and now among the papers before the present committee. The more material of his allegations against Mr. Crown, and by which he attempts to justify the measures by which he ultimately succeeded in driving Crown to an abandonment of the work, may be summed up as follows :

1. He alleges that the contract was never *consummate*, but was only *inchoate*, in consequence of a collateral stipulation or condition *verbally* understood and expressed at the time of its execution, that it was *not to be binding* till Crown had furnished two sufficient *bondsmen* as *sureties* for his performance of the contract; and that, as Crown never complied with this condition, the contract was never *binding* and *operative*.

This allegation rests entirely upon Captain B.'s *ipse dixit*. He does, indeed, refer to a Lieutenant Tuttle, who, he says, was present and knew the fact; but this gentleman has never been called to verify the assertion. Mr. Crown has positively denied it; though, when required, four or five months after the execution of the contract, to furnish these bondsmen, he passively acquiesced, overborne as he was by the power over him, which Captain B. seemed to arrogate, in consequence of the actual contract having been declared a nullity by the department; and he proposed to give such bondsmen, if allowed a reasonable time to procure them. This argues nothing to prove that such a condition was annexed to the *original* contract as *actually signed*, but a mere *concession* of a man supposed to be in the power of others, helpless to resist their requisitions, or unable to make a stand against them, without involving himself in ruin, and called upon to enter into a *new* contract, with new stipulations and modifications, in consequence of the erroneously-assumed nullity of the contract already executed.

That this condition of "*bondsmen*" (so called) was a mere *after-thought* of Captain B., after he received the communication from the department, dated July 26, 1826, and not an original condition annexed to the contract, and, even if it had been so, that it was afterwards entirely waived and given up, are propositions perfectly clear,

in my opinion, from the documents and notorious circumstances in the case.

In the first place, as the contract called for no advances of money to the contractor, there was no occasion for such bondsmen. They were not required of the contractors for *stone*, nor subsequently of Potter and others under contracts for the same bricks Crown was to have supplied.

Then, looking to the terms of the contract itself, and of the documents connected with its formation and execution, we see the whole substratum of the contract *excluding* such a condition. Then, looking to see how the contract, after its execution, was treated and considered by the parties to it, and carried into *actual operation*, and continued to be so treated and considered four or five months without hint of any such condition, it appears to me proved, beyond the possibility of doubt, that it was considered and treated and acted on, by all the parties to it, as a *consummate*, not as a merely inchoate or incomplete contract, and, therefore, either that no such condition was ever annexed, or, if annexed, that it had been waived and given up by common consent. I think, however, the internal evidence all goes clearly to the conclusion that the condition never existed at all, but was an afterthought, and was most unjustly and oppressively imposed on the contractor.

I will now concisely refer to the documents and notorious circumstances that establish this conclusion.

Captain B.'s original advertisement (No. 1) inviting *proposals* for the contract, though it goes into some details as to the *conditions* of the proposed contract, is absolutely silent on any such condition as bondsmen, and in legal construction, as well as by the common sense and practice of men in such cases, *excludes* such a condition.

Captain B.'s letter, (No. 2,) 16th March, 1826, to Mr. Crown, *unconditionally accepting* his proposals, with some reservation of a contingency as to the quantity of bricks to be contracted for, equally *excludes* such a condition.

Captain B.'s original *list*, reported to the Engineer Department, of the proposals he had received in consequence of his advertisement, notes the *unconditional* acceptance of Crown's proposals, and formally and officially certifies to the department "that the contract *entered into* between T. Crown and himself for the delivery of 3,000,000 bricks, &c., *was made* on the most favorable terms." (See printed Doc. No. 8, p. 6.) Here the contract is reported and treated in terms, at the time of its execution, as entirely consummate; as a contract "*entered into*"—"made."

Then a copy of the contract, *in extenso*, is transmitted by Captain B. to the department, as a consummate and binding instrument, without the remotest suggestion or hint of any condition yet to be performed in order to give it effect.

When the department comes to notice the contract, (a copy of which had been so reported and transmitted by Captain B.) and to state objections, these objections equally exclude any inference or hypothesis of there being such a collateral condition yet to be performed as Captain B. afterwards suggested. All the objections of

the department turn exclusively upon the intrinsic terms of the instrument itself; it is clear that (those objections being removed) the department viewed the contract as consummate and unexceptionable in all other respects. A mere *penalty* was all that was thought necessary to give *binding effect* to the contract. What is there said about a *collateral bond* has no reference whatever to collateral *sureties* to the bond; it is only one of two modes proposed for giving the contract the sanction of a mere *penalty*; and either mode would equally have satisfied the department—either a penalty reserved in the body of the contract, or a collateral bond conditioned for the performance of the contract. Neither of these, the one more than the other, imports that *bondsmen* or *sureties* are required. By placing the *collateral bond* on the same footing as the mere reservation of a penalty in the body of the contract, the idea of *sureties* is absolutely excluded. Indeed, it is impossible to read Captain Smith's letter without seeing plainly that the idea of bondsmen or sureties never entered the mind of the Engineer Department.

Again: Mr. Crown, being in want of some pecuniary aid to execute the work he proposed to undertake, obtained from Mr. Leckie a loan of \$800 in anticipation of his proposals being accepted, proposing to refund the loan out of the money to be received on account of his bricks. Accordingly, Mr. Leckie, on the 2d of March, 1826, wrote a letter to Captain B., highly recommending Crown, and wishing to know whether, if he obtained the contract, Captain B. would honor his draft for the \$800; to which Captain B., on the 16th March, 1826, (the very day the contract was executed,) answers that he will "*accept and pay* the order of Mr. Crown for the sum mentioned, or for *any other sum*, whenever he shall *deliver bricks* to the amount of the order." Now, here, the mere *delivery* of bricks is made the only condition of accepting and paying the draft; and if there were really no binding contract at the time, but the whole rested upon the performance of the condition of giving bondsmen, must not Captain B. have further qualified his promise to accept and pay by the proviso that Crown *consummated* the contract, and, in fact, became the *contractor* for the delivery of the bricks? The terms of the answer to Leckie clearly recognise Crown as contractor in fact at that time, and exclude every other qualification of the acceptance and payment of Crown's order except that of the actual delivery of bricks *according to contract*. (See the correspondence between Captain B. and Leckie, annexed to Captain B.'s aforesaid statement to the former committee, C. D. No. 4.)

The admitted facts already adverted to are conclusive of themselves. Crown had, in due time, established his brick manufactory on an adequate scale; had, by the month of July, and long before Captain B. raised this difficulty about bondsmen, actually manufactured 800,000 bricks, being within 200,000 of the amount of the very *first delivery*, which, according to the contract, was to be 1,000,000 delivered on the 1st October; so that he had taken time by the forelock, and had four-fifths of the quantity ready three or four months beforehand; he had actually delivered 5,000 of the bricks as early as *June*, four months before the time fixed for the first delivery.

Here, then, is part execution by *both parties* of a contract which had been standing, with all the *solemnities* of a consummate instrument, for more than four months, which had been officially reported, and all along acted on during that period as a consummate contract, without whisper or hint from any quarter that it depended for its *binding effect* upon any collateral condition whatever. Under these circumstances, and after all this lapse of time, the parties, one and all, would have been absolutely *estopped* (if I may use a technical term) in a court of law to deny the consummate execution and binding force of the contract; and, therefore, all evidence of any collateral condition about bondsmen would have been excluded; or, if such evidence had been admitted, the court would unquestionably have instructed the jury that a waiver and abandonment of the condition ought, under the circumstances, to be *presumed*. But I am clear in the opinion that, upon the strictest legal principles, such a condition, if fully proved according to the statement of Captain B., would have been nugatory and *void ab initio*; that, independent of the circumstances of the subsequent recognition and part execution of the contract already adverted to, the supposed condition never could have operated one instant to suspend the consummation and binding effect of the contract. The soundest and most universally admitted principles of law would have forbidden it. No written contract, especially a contract under *seal*, can be in any manner varied or modified by setting up any *parol* contract, condition, or understanding, as collateral to it. The seal contract is a complete *estoppel* (as the legal phrase is) to any pretence of other terms or conditions but what the contract expresses on its face, or necessarily implies by the fair construction of its terms. True, a deed may be delivered to a *third person* as an *escrow*, subject to regular delivery *in futuro* to the party, upon performance of a *parol* condition, proved by *parol* evidence; but it never can be treated as an *escrow* after solemn execution and delivery to a *party*. Once *delivered by consent* of parties, and it can no longer be an *escrow*, but instantly becomes consummate and absolute. Here there is no pretence, or shadow of a pretence, for treating this contract as an *escrow*. It was regularly executed and delivered to the *party*; treated and acted on by both parties for more than four months as a consummate instrument; actually carried into practical effect and operation by both, and in part *performed* as a *consummate and operative* contract.

Escrow being out of the question, the whole pretence of a collateral *parol* condition about bondsmen is absolutely impertinent and nugatory.

If, however, the question could in any manner be made to turn on the *fact*, or on *parol* evidence of the fact, of such a condition having been originally agreed to *verbally* at the time of the execution of that contract, the fact could not be said to be satisfactorily established by the statement of Captain B.

He refers to evidence in corroboration of his statement never to this day produced—the evidence of Lieutenant Tuttle. His statement, being the statement of a *party*, is met by the positive denial of the other party. It is inconsistent with, and most conclusively repelled by,

all the facts and circumstances preceding, accompanying, and following the execution of the contract; inconsistent with all his own sayings, actings, and doings for more than four months after the execution of the contract. The pretence is set up at a time (July or August, 1826,) when he had a *new* motive and a direct interest to imagine and trump up some apology for his conduct. The contract which he had drawn and executed had been condemned by his superiors as so negligently or ignorantly drawn as to have imposed an obligation on the government to pay the price of the bricks without any reciprocal obligation on Crown to deliver them. Manifest as was the absurdity of this notion, he had an obvious motive and an interest of professional pride to clear his skirts of the gross ignorance and negligence implied by the objections to his contract urged by his superiors; and this he attempts by the almost equally absurd pretext of Crown's original stipulation to give a collateral bond, with sureties, and of a mutual understanding that the contract was to remain unconsummated and suspended from all binding effect till such bond and security were given; though he most inconsistently admits, or clearly shows, that it was in the meantime carried into practical effect and operation, without an instant's delay—as if a contract could *operate* and be carried into execution as such, whilst it stood suspended and was no contract, but a mere *project* of contract, waiting for some act to be done before it could operate as a contract.

I say nothing of the more interested and corrupt motives attributed to him—and under a strong suspicion of which he appears to have labored at the time—of a secret participation with Potter in the profits of the contract with that person, when it was contrived to bring him in to supersede Crown in the business.

2. Captain B.'s next charge against Crown is, that of the 800,000 bricks which he admits had been manufactured between March and July, there were only 250,000 fit to pass inspection, and to be worked up in the fort.

Now, admitting for a moment this charge to be true in its terms, what does it amount to, and how may it possibly affect Crown's rights under the contract, or establish against him anything approaching a breach of contract? This immense quantity of brick had been manufactured so early as July, at least three months *before* the time (1st October) when Crown was *bound* by the contract to deliver any bricks at all—one-third of the whole, that is, 1,000,000, being deliverable on the 1st October, one-third on the 30th November, and the remaining one-third on the 31st December. All that might be delivered any time before the 1st October depended entirely on Crown's own option. Nothing can be clearer, from the terms of the contract, than this—that he was not *bound* to deliver a single brick until the 1st October, 1826, but might, at his option, deliver them any time before. Then, if it were clearly proved that in July, 1826, 550,000 of the bricks then burnt were unfit to be received, he had abundance of time before the 1st October to make up the deficiency, and could be charged with no sort of default under his contract before the last named period.

But is the fact satisfactorily proved, by any means, that the bricks which Crown had ready for delivery by the month of July, 1826, were

of the bad quality represented by Captain B., in the proportion of 550,000 to 800,000?

For this fact, again, we have nothing but Captain B.'s *ipse dixit*. He produces no actual *inspection* and *condemnation* of the bricks, nor any other sort of evidence to corroborate his statement; but he is most powerfully, if not conclusively, contradicted in this fact by the positive evidence of several credible and unsuspected witnesses, and by several cogent *circumstances* appearing in the case.

Alfred Emerson proves he was present when Captain B. refused to receive the bricks, and that his refusal was grounded, *not* on any alleged defect in the *quality of the bricks*, but expressly on an alleged defect in the *contract* between him and Crown. The particular defect in the contract alleged by Captain B. is not recollected by the witness; but it must have been either the absurd one pointed out by the Engineer Department in Captain Smith's letter, or else the newly-set-up pretext of Captain B. himself, of the want of bondsmen.

Three other witnesses, James H. Henry, David Hepburn, and a person whose deposition was taken at Norfolk, in March, 1836, Z. Hawkins, (Nos. 7, 8, 9,) all expressly prove the good quality of the bricks; and further prove the damning fact, that the very same bricks which Captain B. affects to condemn as of bad quality in the hands of Crown, were immediately afterwards accepted of Potter as good bricks, and actually worked into the fort, after poor Crown had been compelled, by the chicaneries of Captain B., to sell the bricks, at a reduced price and at a cruel sacrifice, to Potter, and let him take his (Crown's) place as contractor for bricks. They further prove that these very bricks were of better quality than those afterwards manufactured by Potter, and accepted as good bricks, and worked into the fort. These three witnesses had the best opportunities of observing and knowing the facts to which they testify, as will be obvious from a reference to their depositions, and to their employment as artisans on the work. One of them, Henry, had been employed by Crown as brick-maker in his yard, and was afterwards continued in the same employment by Potter after he took the yard. The fact, therefore, was within his personal observation and certain knowledge; he could not be under any honest mistake; the facts he proves must be true, or he perjured. So the other two witnesses, Hepburn and Hawkins, were both *bricklayers* employed by Captain B. on the construction of the fort; their means of personal knowledge of the fact testified by them equally exclude any possible presumption of honest mistake.

General Gratiot, indeed, in his letter to the Secretary of War, dated 20th February, 1829, (see the above-cited Document No. 8, p. 2,) does make a suggestion benevolently intended to ease off Captain B. from this damning fact. "With respect," he says, "to the statement that Captain B. purchased afterwards from *Mr. Potter* the brick which he had refused to receive from *Mr. Crown*, there is no other evidence than that contained in the papers furnished by Mr. Crown; and, *without impeaching the veracity of either of the deponents to that fact* it is evident that the one may have been *misinformed* as to the *identity* of the bricks purchased from Potter, and that the other may have worked up in the fort bricks *made by Crown*, since there is evi-

dence of *purchases* having been made from *him* by Captain B." Now, this hypothesis, in both its branches, is purely gratuitous; nay, gratuitous as it is, General Gratiot has clearly misapprehended the force and bearing of the evidence. Henry, the first witness to whom he alludes, does not speak on *information* at all, but on personal knowledge, and obviously with the best means of personal knowledge. What ground, then, for the general's hypothesis of "*misinformation?*"

As to the other hypothesis upon which the general accounts for possible error in the evidence of the two other witnesses—namely, that the bricks of Crown's manufacture, which they speak of having worked up in the fort, were only those which Captain B. had purchased of Crown himself, not those sold by Crown to Potter, and by him afterwards delivered to Captain B.,—it is evident the general has inadvertently fallen into some confusion and misapprehension respecting the evidence. He speaks of "evidence of *purchases* having been made from him (Crown) by Captain B."

Now, what "evidence of purchases" can be here alluded to? The only purchase from Crown, that is, the only delivery of bricks by him, was of the small quantity of 5,000 delivered so early as the 28th of June, the month before his establishment was turned over to Potter; yet the General speaks of "*purchases*" indefinitely. It has struck me that he may possibly have been misled by some similitude in the appearance of two different names as they are written in Mr. Hagner's statement (No. 10) of bricks purchased and paid for by Captain B., where may be seen in the same list the names of Thomas Crown and Thomas Cowan; the first being put down for 5,000 bricks delivered on the 28th June, 1826, the last for 286,000 in January, 1827, long after poor Crown had been driven off by the intrigues and chicaneries practised against him.

However this be, the least careful examination of the depositions must put it beyond the range of any moral or legal probability, and of any rational presumption, that these witnesses could have confounded the 5,000 bricks delivered by Crown in June, 1826, with those delivered by Potter after he had displaced Crown. One of them, Hepburn, was not employed on the work till November, five months after the 5,000 bricks had been delivered; and the others, though employed from the beginning—the one in the brick-yard, the other on the masonry of the fort—show, in the whole context of their evidence, too plainly to be misunderstood, that they speak, with intelligence and discrimination, of the bricks delivered by Potter after he had displaced Crown.

The statement of Mr. Hagner, just referred to, supplies matter of strong corroboration to the evidence (if it wanted corroboration) of these witnesses, as it shows that Potter had, by the 31st *July*, delivered 378,000 *hard-burnt* bricks. Now, this was almost immediately after the establishment was turned over to him, and before he could possibly have had time to manufacture and burn the bricks. [See Mr. Hagner's statement, No. 10.]

3. The last of Captain B.'s pretexts for ousting Crown of his employment is two-fold—his want of *capacity*, and his want of *means* to carry on the work.

His industry and bodily exertions are admitted, in terms, as exemplary; his honest and persevering endeavors to perform the work are not questioned—'tis his *capacity* (meaning, I suppose, mental capacity) alone that is objected to. Now, if he had not sufficient capacity for a *brickmaker*, what could he have had any capacity for? It was a profession which he had pursued, with success and on the largest scale, for many years, and in which he had acquired the largest experience. If, in all that time and with all that experience, he had not capacity to learn such a mechanical profession, and to acquire competent skill in it, he could have had no more brains than one of his own bricks; absolute and hopeless idiocy, at least, must be imputed to him. The very practice and experience he is proven to have had in the business, must have evidently qualified him for the undertaking, supposing him not to be a born idiot. He had been most extensively employed in this city and other places in the very business of conducting the practical operations of brick-yards on the largest scale; and, among other undertakings of the same kind, had manufactured the bricks for Fort Washington. Yet, with all this long and diversified experience, after the great number of most competent judges with whom he had come in contact in the course of his business had vouched his capacity and fitness, Captain B. is the very *first* and the very *last* who pretends to have detected any want of capacity.

His capacity, indeed his eminent qualifications, from long and large experience, for the business, are vouched for by numerous witnesses, themselves most competent judges and of unquestionable veracity. The late Robert Leckie alone, if all the others were out of the way, would be sufficient to annihilate the assertion of Captain B. on this point. Mr. Leckie was one of the most respectable in point of character, and one of the most skilful and best instructed of our mechanics—indeed, a general architect of respectable standing. To his are added the positive, unequivocal testimonials of many gentlemen; some of whom from their professional pursuits as military engineers, others from their experience as employers of mechanics to furnish materials and execute brick-work, may be considered as eminently qualified to judge of the matter; and I will, therefore, simply refer to the testimonials, before the committee, of Robert Leckie, General Gratiot, Colonel Bomford, Major Wade, Commodore Rodgers, A. B. McLane, and William A. Bradley. (Nos. 11, 12, 13, and Mr. Leckie's before-mentioned letter to Captain B., dated 2d March, 1826, annexed, as exhibit C, to Captain B.'s statement.)

Captain B.'s charge of incapacity being thus trampled under foot, the very circumstance of his having urged so groundless a complaint to his superiors against Mr. Crown sufficiently evinces his evil disposition towards the individual, and the evil motives that must have actuated him in persecuting that individual out of his lawful and proper employment in the public service.

The want of *means*, which Captain B. has coupled with the want of capacity, is a complaint equally groundless, and just as completely overwhelmed by evidence in contradiction of it as the other, and in one view, perhaps, has a more malignant aspect.

The very fact that Crown had completed his brick-yards and manufacturing establishment upon such a scale as to have 800,000 bricks manufactured and ready for delivery three months in advance of the time fixed for his first delivery of bricks under the contract, does of itself refute the complaint of inadequate means. Mr. Leckie (No. 11) proves that he entered on the business with a ready-money capital of at least 1,300 dollars, 800 of which was lent by Mr. Leckie himself, and that capital backed by a fair personal credit. When he commenced operations under the contract he found no difficulty, though a stranger, in obtaining what credit he required in anticipation of his expected receipts on account of bricks. If he had been fairly dealt with by Captain B., he would have had abundant funds, and in full time, to discharge his engagements and keep up his credit. At the very time he was forced by the cavils, chicaneries, and intrigues of Captain B. and Potter to surrender his establishment, and was made to feel the pressure of pecuniary embarrassment, he was entitled to receive of Captain B. abundant funds to place him at ease. The 800,000 bricks, at \$7 75, should have placed at his disposal \$6,200 in ready money; and even if Captain B. were sustained, as he is most victoriously contradicted, in saying that only 250,000 of that quantity of bricks were fit to be received under the contract, even then the \$1,937 50, which, without any dispute, he was entitled to for the latter quantity, would have enabled him to prosecute the work with credit and advantage. But the evidence is positive and clear that Captain B., in July, refused to receive any of the bricks, but insisted on Crown's selling out to Potter.

Then the very embarrassments brought suddenly upon Mr. Crown, and the only want of means or credit ever manifested in the course of his operations, were all the direct effects of Captain B.'s chicanery and oppression; and he has the grace to set up the *consequences* of his own misconduct as the apology for that very misconduct, and as *criminatory* of the *victim* of that misconduct.

I do not think it at all material to trouble the committee with any remarks upon any of the points in the case; but these general principles of the law of contract, and of the evidence by which the execution of the contract and the excuses for the breach of it, should be determined.

The evidence of Mr. Leckie and others will supply the data whereby to estimate the losses of the claimant, or the equitable compensations that ought, *ex æquo et bono*, to be awarded him.

W. JONES.

FEBRUARY 20, 1837.

No. 2.

OAK ISLAND, N. C., *March* 23, 1830.

SIR: In answer to your letter of the 11th instant, I now enclose the original contract entered into between Mr. Thomas Crown and myself, for the delivery of three million of bricks for the fortifications

under my superintendence at this place, marked A. This is the copy of the contract which was forwarded by me to the chief engineer, and which was not sanctioned or approved by him. The letter marked B is a copy of one received from Captain J. L. Smith, who was then the assistant to the chief engineer, and contains the objections held by the Engineer Department to the contract. It is proper to observe in this place that no penalty was expressed in the contract, because it was intended to send a bond with it, but which was not done, owing to the delay of Mr. Crown to name his bondsmen. About the middle of July, 1826, four months after the contract was entered into, Mr. Crown named as his securities Col. Bomford and Major Wade, of the United States army, neither of whom, however, had, as I understood from them afterwards, ever given him any authority to do so. It was distinctly understood by Mr. Crown that the contract was not to be considered binding on either party until security was given by him for its faithful performance.

Having obtained leave of absence for a short period, I met Mr. Crown in Fayetteville, either the last of March or early in the month of April, 1826, on his way from Washington city to Smithville, for the purpose of commencing the brick-making business; and in a conversation which I had with him at that time, he stated to me that his means were ample; that he had made an arrangement with the Branch Bank of the United States at Washington to discount his paper, and that he could procure from that institution funds enough to enable him to go on with the contract. I beg leave to refer to the paper marked C, and my answer thereto, marked D. He also stated to me that he had sent by water fifty or one hundred laborers, (negroes,) with provisions to last them at least six months, when the truth was that he had four men and one boy only, and not over one month's provisions for that limited force. These facts were made known to me while I was in Philadelphia by Lieutenant Tuttle, of the corps of engineers, who was then my assistant. He declared his belief of Crown's inability to perform his contract for the want of capital to employ the requisite force.

About the 20th of June, 1826, I returned to my station, and soon after visited Crown's brick-yard, to make an inspection of his work, and to satisfy myself of the probability of his being able to manufacture the number of brick which he had contracted to deliver. I found that, instead of the brick being manufactured of *pure clay*, as was to have been done, agreeably to the directions given to Crown by myself and Lieut. Tuttle, he was making them of a mixture of loam, clay, and sand; and that, out of one or two kilns which he had burnt, there was nearly a total loss, 5,000 only being of a quality fit to be received. These were received, and Crown was paid for them at the rate stipulated in the contract, (E,) though I did not conceive myself to be bound to receive one single brick until security had been given for its faithful performance, and until the contract should be approved by the chief engineer.

Crown became much embarrassed in his circumstances, and applied to me for an advance of \$1,000 to \$1,500, which it was not in my power to comply with, as the law prohibits advances on contracts;

and on the 31st July or 1st August, 1826, he, without advice or persuasion on my part, came forward and voluntarily relinquished his contract. The letter of Capt. Smith, (marked B,) returning the contract, was written on the 26th July, 1826, and received here on the 5th August, 1826. Crown relinquished the contract on the 1st of August, 1826, *and knew nothing of the objection urged against the contract until I informed him thereof, four or five days after its relinquishment.* When Crown came forward and relinquished the contract, he stated his reasons for doing so, and, to the best of my recollection, they were as follows: That he could not get bondsmen, and that he had no means of his own to enable him to pay his hands, and such other expenses as were necessary. This explains why another contract was not drawn, free from the objections entertained by the Engineer Department to the one which had been entered into.

Relative to the non-reception of Crown's brick, it is not true that I refused to receive the brick which he had made. The number stated in my letter to the chief engineer is an error; 500,000 should have been the number in lieu of 800,000. I did receive 5,000 from him, and that is the whole number which he ever delivered here. I did refuse, however, to advance him the sum that he wanted, and receive the brick at the yard; and my reason for doing so was, that the contract stipulated that they were to be delivered by Crown at Oak island. If I had consented to have received them at the yard, it would have been a breach of contract; and, besides, Mr. Potter, to whom Crown owed a considerable sum for advances made to him, would not let them be removed until Crown gave him security for the sum which he owed him. This is the true reason why Crown did not deliver them.

The day on which Crown gave up the contract, or a day or two after, he called on me, and informed me that he had endeavored to sell what brick he had on hand to Mr. John K. Holmes, who was prevented, I understood him to say, from closing the bargain, in consequence of Mr. Potter refusing to let the brick be removed from his land until he (Crown) should pay for the advances made to him in money and labor by Potter. He told me that he would try to effect a settlement with Potter; and not long afterwards came into my office with Mr. Potter, and told me that the bricks were disposed of to him, for the purpose of enabling him (Crown) to close all his business previously to his leaving this section of country. The only difficulty in the final settlement of their accounts was the price which I was to allow Potter for the brick, as there was a risk in Potter's taking the brick and selling them for the price which Crown was to have received by the contract, viz: \$7 75 per thousand.

On a full consultation with the parties, in which Lieutenant Tuttle, of the corps of engineers, then my assistant, participated, it was determined to allow Potter \$8 50 per thousand for all the good brick. This price was fixed upon with the full approbation of Mr. Crown, and with a view to his benefit alone, for it enabled him to pay Potter all he owed him, and to receive a sum of money (the amount not known by me) from Potter. Crown expressed his gratitude for the liberality

which I had manifested towards him. Out of these brick Potter delivered about 250,000.

Previous to this transaction, nearly a million of small brick had been purchased of Potter by Lieutenant Tuttle before I came here. These brick contained sixty-four cubic inches each, for which \$7 50 per thousand was paid, by the express authority of the chief engineer. These small brick were made the basis of calculation for establishing the price of those which Crown had sold to Potter, containing eighty-three cubic inches, and which, at the same rate of the small brick, would have been worth \$9 72.6 per thousand. Crown, himself, proposed that I should allow Potter \$9 per thousand for them.

The only contract that I have had for the delivery of bricks at Oak island was the one with Crown. He did not transfer that contract to any person whatever. He gave it up unconditionally, and for the reasons before stated. All the brick, except those referred to above, which have been used in the work, have been purchased without a contract, and have varied in price from \$4 to \$10 per thousand, according to size and quality.

You request me to state what assistance I rendered to Crown. The payment to him for the 5,000 bricks, when it strictly should have been made to Mr. Leckie, of Washington, and to whom I conceived myself individually responsible for the amount, (\$86 75), is one instance. Permitting him to proceed at all with his contract after he deceived me as to his means of carrying it on, or until the security for its performance was given, is another instance. Also, in the settlement of a difficulty between him and Potter, when I inspected the brick-yard, by which Crown was saved the mortification of being driven off from the brick-yard by Potter, who had called his negroes for that purpose.

I have the honor to be, very respectfully, your most obedient servant,

GEO. BLANEY,

Captain Corps of Engineers.

Hon. RUFUS MCINTIRE,

Of the Committee of Claims, &c., &c.

Sworn to before me.

SAM. POTTER, J. P.

No. 3.

A.

Articles of agreement made at Smithville, North Carolina, on the sixteenth day of March, in the year of our Lord one thousand eight hundred and twenty-six, between George Blaney, captain of the United States corps of engineers, superintending the construction of the fortification at Oak island, near the mouth of the Cape Fear river, in the State of North Carolina, of the one part, and Thomas Crown, of Shepherdstown, in the State of Virginia, of the other part.

This agreement witnesseth, that the said George Blaney, for and

in behalf of the United States of America, and the said Thomas Crown, his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree to and with each other, as follows, to wit :

1st. That the said Thomas Crown, his heirs, executors, or administrators, shall deliver at the United States wharf at Oak island, near the mouth of Cape Fear river, three million bricks, in the manner following, to wit :

One million on or before the first day of October, 1826 ; one million on or before the thirtieth day of November, 1826 ; and the remaining one million on or before the thirty-first day of December, 1826.

2d. That the said three million brick shall be manufactured of such clay as shall be approved by the engineer superintending the fortifications at Oak island, and shall be made in moulds of the standard size adopted by the corporation of the city of Washington ; that is to say, the brick, when moulded, shall measure nine and one-eighth inches in length, four and five-eighth inches in breadth, and two and five-eighth inches in thickness.

3d. That the said three million brick shall be all hard-burnt, and shall be subject, on inspection, to approval or rejection by an officer of engineers, or such person as shall be appointed by the superintending engineer of the fortifications constructing at Oak island, for that purpose.

4th. That the said Thomas Crown, his heirs, executors, or administrators, shall be entitled to receive from the United States, through the hands of said George Blaney, or such other officer of the United States as shall be duly authorized, for the brick delivered by virtue of this contract, the sum of twenty-three thousand two hundred and fifty dollars, lawful money of the United States, being at the rate of seven dollars and seventy-five cents for each and every thousand brick.

5th. That the said Thomas Crown, his heirs, executors, or administrators, shall be entitled to receive from the United States, in the manner stipulated in the preceding article, on the delivery of any part of the said three million of brick which shall have been inspected and approved by the person designated by the superintending engineer of the fortifications constructing at Oak island, a sum corresponding with the quantity actually delivered, at the rate established in the foregoing stipulation.

In testimony whereof, we have hereunto affixed our hands and seals the day above written.

GEO. BLANEY, *Capt. Eng's.* [L. S.]
THOMAS CROWN. [L. S.]

Signed, sealed, and delivered in presence of—

JOHN H. HOLMES.

JOHN BROWN.

It is understood that the United States are to furnish hands to receive the brick as they shall be tossed or thrown from the vessel by the contractor.

GEO. BLANEY, *Capt. Eng's.*

No. 4.

SMITHVILLE, *March 22, 1830.*

Having been called on by Captain George Blaney, and requested to state in writing what I recollect of a contract made between him and a Mr. Thomas Crown, and all the circumstances connected therewith, they were, to the best of my knowledge, as follows :

Some time in the winter of 1826, Mr. Crown arrived at Smithville ; made a contract with Captain Blaney to make and deliver a large quantity of bricks the next summer—the quantity not recollected certainly, but perhaps three millions, or upwards ; the said Crown visited my brick-yard, and agreed with me that the brick should be made there, on such terms as we should think equitable and right, saying that he would return to Washington city, where he had at his command all things necessary for the completion of the contract, and that in April he would return to this place with all things needful, as above stated. During his absence I employed what hands I had in cutting wood and digging clay, and such other work as was needful to prepare for the season. In the early part of April, Captain Blaney left this place for the north, and about the same time Mr. Crown arrived ; but not, as he had promised, with forty or fifty hands, a year's provisions, &c., &c. He had only four men and a boy, a small quantity of provisions, and, from good authority, I believe not more than \$100 in cash. This circumstance alarmed me ; but, as Captain B. was absent, I would not refuse Mr. C. the chance of making the bricks at my yard, as in fact there was no other place in this vicinity where they could be made at any fair price. I therefore agreed with Mr. C. to give him up the yard, with all the apparatus thereto belonging, together with all the wood I had cut, (500 cords,) with the privilege of cutting and burning as much more as would be necessary for three million bricks, for the sum, as well as I can recollect, of \$3,500, and also to hire my negroes. In pursuance of which, charge of the yard and hands were given up to him, the said Crown.

It was in vain that Mr. C. endeavored to procure the number and description of hands required to carry on the business, and most that he was able to get remained with him for a short time before they became dissatisfied and left him. He commenced burning a kiln of bricks of near 100,000, early in the progress of which it appeared to all who witnessed his management that he knew but little about the business he had undertaken, which was fully proved at the opening of the kiln ; for out of it he got but five thousand bricks which would pass inspection. By this time every circumstance seemed to portend an unfavorable issue ; and my interest being deeply involved, I watched with great anxiety the return of Captain B., believing that he would immediately avail himself of the circumstance of Crown's not having furnished the security required by the contract, to declare the same null and void ; but to my surprise and regret, on Captain B.'s arrival, (I think in June,) he still appeared to retain some confidence in Crown ; in consequence of which, he was allowed to go on until the latter part of July, previous to which, seeing his success impracticable,

I resolved to make him no further advances. His money had been long before exhausted ; his stores nearly so, and his credit entirely so ; and, with all, his health prostrated, and he involved in debt. On which, (as I understood,) he requested of Captain B. an advancement of money, or a release from the contract ; the latter of which was preferred by Captain B. It was then impossible that Mr. Crown could pay off his debts, unless he could get some money. I was then in advance, at a fair calculation, from five to six hundred dollars. He had by this time burnt three kilns more of bricks, which had not yet been opened, but were judged to be but little better than the first ; the whole quantity which were then on hand being about four hundred thousand, of which Captain B., in order to get rid of Mr. Crown, promised me that he would take all that he could possibly make do, at a small advance on the price which Crown was to have had, if I would advance to Crown \$600, which he said was the least he could do with. I was obliged to do so, for my brick-yard, hands, &c., were, as things then stood, a sinking business to me. I went on to deliver the bricks which Crown had given up to me, and Captain B. received near three hundred thousand, of which a large quantity were salmon bricks, and but few such, if any, as Captain B. has required of me ever since.

From a reasonable calculation, by the waste of wood, clay, &c., which were prepared for the season's work, and which could not be replaced in time to enable me to repair or to redeem the lost time, together with my negro-hire and advance of money, I consider that I was injured at least \$1,000 by Mr. Crown.

The foregoing is, to the best of my memory, a true statement of facts, as clearly as I am able to set them forth.

SAM'L POTTER.

No. 5.

TREASURY DEPARTMENT,
Third Auditor's Office, March 1, 1830.

SIR : At the request of Mr. Crown, and by direction of the Secretary of War, I have the honor to inform you that it further appears from the account of Captain George Blaney, the officer disbursing at Oak island, North Carolina, the following payments were made to Samuel Potter and Hayne & Potter, for bricks delivered there between the 10th of August, 1826, and 10th of August, 1827 :

1826.			
Dec. 27.	Samuel Potter, for 264,689 bricks, at \$7 50.....	\$1,985 16	
	Same.....244,590 bricks, at 8 50.....	2,079 01	
	Same..... 26,960 salmon, at 4 00.....	107 84	
Dec. 30.	Same..... 16,008 bricks, at 8 50.....	136 07	
1827.			
Feb. 26.	Same.....334,879 bricks, at 8 50.....	2,846 47	
April 18.	Hayne & Potter, for 59,720 soft, at 4 00.....	238 88	
May 30.	Same.....455,998 hard, at 8 50.....	3,875 97	
June 30.	Same.....107,840 hard, at 8 50.....	933 64	

July 31.	Same.....	173,500 hard, at \$8 50.....	\$1,474 75
	Same.....	25,080 hard, second quality, at \$6.....	150 48

Respectfully, your obedient servant,

PETER HAGNER, *Auditor.*

Hon. E. WHITTLESEY, *House of Representatives.*

No. 6.

ENGINEER DEPARTMENT,

Washington, March 2, 1846.

SIR: Your communication of the 27th ultimo, making several inquiries in regard to contracts entered into by officers under the control of the Engineer Bureau, and requesting information in the particular case of a contract with Thomas Crown, has been received, and, in reply, I have the honor to give the following answers to the questions therein propounded:

1st. Whether contracts made by officers under the control of your bureau must, "in *all* cases, be approved by the bureau, or by the department, in order to make them binding upon the United States?"

In all cases of contracts made by officers under the control of this department, the contract must be sanctioned by the Chief Engineer, in order that such contract may be binding upon the United States. The words of the existing regulation on the subject are: "No contract will be binding upon the United States, or will go into operation, until it has been sanctioned by the Chief Engineer."

2d. "Is the case of Thomas Crown an exception to this rule, or was an approval of his contract *indispensable* under the usages and instructions of the department, to its completion?" "Are all contracts considered *inchoate* until approved?"

The usages and instructions of the Engineer Department have been uniform in this respect since February, 1840, the date of the present regulations, requiring in all cases a compliance with the requisitions of said regulations. The regulations in force at the time of Mr. Crown's contract required that when the contracts were made they must be reported to the Engineer Department, "accompanied by a list of the proposals, and a certificate declaring them to have been made on the most reasonable terms that could be procured; and copies of all contracts so made must be forwarded to the Engineer Department."

And it appears, on reference to a letter from this department, signed by Captain J. L. Smith, of July 26, 1826, (a copy of which is found in House document No. 8, 21st Congress, 1st session,) that it was then the usage of the department to disapprove contracts thus transmitted for its examination, when they were not deemed to guard sufficiently the interests of the United States. It seems to me the action of the department, in pronouncing that contract a "nullity,"

is unequivocal as to the understanding it had of its own powers over contracts in that condition.

3d. "The committee also desire to know upon what grounds the bureau predicated its rejection of the claim?"

It would appear, from this interrogatory, to be the opinion of the committee that Mr. Crown had, under his contract, addressed a claim to this bureau, which had been rejected—the grounds for such objection being now asked for by the committee. I have caused diligent search to be made through our records up to the 1st of January, 1830, (a day later than that on which the Secretary of War reported the case back to the House,) without finding any evidence of such claim.

As to the view taken at that day by the Engineer Department, of the circumstances of this case, we have found no other evidence or facts than are explained in, or to be inferred from, the printed documents before referred to.

I am, very respectfully, sir, your most obedient,

JOS. G. TOTTEN,
Colonel and Chief Engineer.

Hon. J. WATKINS LIGON,
Committee of Claims, House of Representatives.

No. 7.

ENGINEER DEPARTMENT,
Washington, March 18, 1846.

SIR: Your letter of yesterday, enclosing the contract of Thomas Crown, and making, in behalf of the Committee of Claims, the inquiries whether or not the contract is "drawn up in the same manner or form, and stated in the same terms and substance, that contracts for similar work under your department are usually drawn," and whether or not the contract "is such as the practice of the department has usually sanctioned," has been this day received.

Upon an examination of Mr. Crown's contract, I find it to be deficient in the following particulars, viz:

1st. It contains no certificate, by the officer, that the contract was entered into on the most favorable terms that could be procured. This certificate was required by the regulations in existence in 1826.

2d. Contracts cannot now be transferred, either in whole or in part, and must contain a statement to that effect. This does not appear to have been the case in 1826.

3d. Contracts either contain, or must be accompanied by, some provision guarantying the full and faithful performance, by the contractor, of all the stipulations of the contract. This is done either by taking the contractor's bond, with security, or by retaining from the periodical payments a certain per centage of the amount due. This usage seems to have been enforced in 1826, as would appear from an inspection of the contracts of that period, as well as from the cor-

responsdence of the Engineer Department in relation to the very contract now under consideration.

4th. Many contracts entered into about the period of 1826, as well as those of the present date, contain a provision stating that the contract is not binding upon the United States until approved by the War Department or by the Chief Engineer; and, even though the contract contained no such express provision, still it would not now be considered binding without such approval; nor is it doubted that such approval was in 1826 considered necessary to the validity of contracts.

5th. In every contract there must be inserted an express provision that no member of Congress shall be admitted to any share or part thereof, or to any benefit to arise therefrom. (See act of April 21, 1808, section 3.) This provision of the law appears not to have been enforced about the time that Mr. Crown's contract was prepared. Its non-observance was perhaps owing to the fact that its existence was at that time unknown.

Mr. Crown's contract is returned herewith.

I have the honor to be, very respectfully, your most obedient,

JOS. G. TOTTEN,
Colonel and Chief Engineer.

Hon. T. W. LIGON,
House of Representatives.

No. 8.

WASHINGTON, *December 23, 1835.*

SIR: In compliance with your request, I will briefly note my recollection of one or two facts connected with your engagement in 1826 to furnish bricks at Oak island, North Carolina, and I do so more cheerfully in consequence of having been one of the persons who recommended you for the employment.

In my recommendation, which was at the time supported by several persons of the most respectable character, I stated that independent of your experience in brick-making, you furnished the materials and erected several houses for me; and that, in every instance, you had fulfilled your engagements promptly and to my entire satisfaction.

Some time after this recommendation, and after I had been informed of your having obtained a contract, application was made to me, I think either by or through Captain Blaney, to know whether I would become one of your sureties; and to which I answered that I could not, consistent with a fixed determination, which was, while in office to avoid any connexion with public contracts; but that, under other circumstances, I should not have the slightest objection.

With esteem, sir, your humble servant,

GEORGE BOMFORD.

TO THOMAS CROWN.

No. 9.

ENGINEER DEPARTMENT, *February 10, 1846.*

In entering into contracts with individuals for the execution of work, delivery of materials, &c., it is customary with this department to retain from the occasional payments made to such contractors, a per centage of the amount due, (usually about 20 per cent.,) which is retained in the hands of the government as a guarantee for the faithful execution and completion of the contract; or to require of such contractors bond, with security, for the faithful execution of their contracts.

Where a per centage is retained, as above, the retained amount is, of course, paid over to the contractor upon the satisfactory completion of his contract.

J. G. TOTTEN,
Colonel and Chief Engineer.

Hon. T. W. LIGON,
House of Representatives.

No. 10.

WASHINGTON, *January 30, 1836.*

I have known Mr. Thomas Crown as a brick-maker for several years, and believe him well qualified to manage that business. In 1829 and 1830 he delivered bricks at Fort Monroe, Virginia, which were approved of as bricks of good quality, and suitable for permanent building.

A. B. McLEAN.

To whom this may concern :
W. A. BRADLEY.

We agree with Mr. McLean in respect to the opinion he has given of Mr. Thomas Crown as a brick-maker.

JNO. RODGERS.
C. GRATIOT,
Brig. General.

No. 11.

WASHINGTON, *January, 1828.*

Mr. Thomas Crown was employed in the erection of the United States arsenal near Pittsburg, Pennsylvania, as master brick-layer, in the years 1814, 1815, and 1816. He performed nearly all the brick-work of that extensive establishment by contract; and the work was executed in a satisfactory manner, as respects both its quality and the promptness of performance.

I state these facts from personal knowledge, as I was stationed at that post at the time, and was engaged in the supervision of the work.

W. WADE,
Major U. S. Army.

Having employed Thomas Crown in the execution of several pieces of work, I generally found him to be highly attentive and prompt in the performance of his engagements with me.

G. BOMFORD.

WASHINGTON CITY, *February 1, 1830.*

I hereby certify that I was employed by Thomas Crown as a brick-moulder at Smithville, North Carolina, to assist him in moulding bricks for the fortifications at Oak island, in 1826. I am under the impression that he had between eight and ten hundred thousand bricks made and burnt. I am confident there were not less than two-thirds that were of the best quality of bricks, which were worked into the fortifications. However, it appears there was a contract made between Captain G. Blaney and Mr. Crown, when it appears the contract, being sent to the Engineer Department, was returned without being executed, from what cause I know not; but so it was. Captain Blaney would not receive the bricks that Mr. Brown had made; and he (Mr. Crown) could raise no money to continue on the the work, being a stranger in that country. I had no funds to continue the work. He had hired hands of a Mr. Potter in that country, and he also furnished ground for Mr. Crown to make the bricks on, for which Mr. Crown was to compensate him. It further appears that, after Captain Blaney would not receive the bricks, Mr. Potter observed he would purchase them of Mr. Crown, at a very reduced price, perhaps at one-fourth of the value; and if he would not take his offer, he would attach the same to secure himself, as there was no person in that country that was able to purchase them except for government. Mr. Potter being a wealthy man, and who Captain Blaney boarded with, I have no doubt but there was an arrangement made between those two gentlemen. It also appears that Mr. Potter was an applicant for the contract previous to Mr. Crown's getting it. I will state one circumstance, previous to the latter taking place: That Captain Blaney and Mr. Potter came to Mr. Crown's brick-yards together, and he (Potter) said, in the presence of Captain Blaney, that if said Crown did not consider him as a partner in the business, that he would call his negroes together and put him across the creek. There was considerable confusion took place, which had mysterious appearances. At length, Mr. Crown, from the repeated propositions of Potter, was obliged to sell out his establishment and brick at a great sacrifice, and returned home. I continued to work with Potter the balance of the season; and the bricks made by T. Crown were purchased from Potter at a price not less than from seven and a half to eight dollars per thousand, and worked in the fortifications at Oak island; and those were as good bricks as I have ever seen in any part of this country; and I am

under the impression that Mr. Crown could not have received more than two dollars per thousand for the bricks, under the compulsory means then pressed upon him. I am under the impression that if Captain Blaney had received the bricks made by Mr. Crown, that he would have completed the contract without the least difficulty.

JAMES H. HENRY.

DISTRICT OF COLUMBIA, }
Washington County. } ss.

Personally appeared before me, the subscriber, a justice of the peace in and for said county, James H. Henry, and made oath on the Holy Evangeiy of Almighty God, that the within statement of facts is just and true, as they are stated, and was a witness to all the circumstances as related in the within; and further this deponent saith not.

Given under my hand and seal, this 4th day of February, 1830.

HENRY WERTZ, Jr. [SEAL.]

Having been called on by Mr. Thomas Crown, after charging my memory with what occurred at Oak island, North Carolina, between Mr. T. Crown and Captain George Blaney, in the year 1826, I think some time in the month of August, I fell in company at Captain Blaney's office, or at the door, and I heard Mr. Crown state to Captain Blaney that he would wish him to enter into a new contract, or receive his brick that said Crown had made under the contract; and Captain G. Blaney stated that the contract had been returned, not having been met with security, or something to that amount; but he (Captain Blaney) alleged that Crown had better sell them to Samuel Potter, as he had means sufficient to buy them; or may be it might be better for Crown to take Potter into partnership with him; but he (Blaney) stated that he would not receive them from Crown. I was two or three times at the brick-yard where Crown made the bricks, and he certainly had gone to a great deal of expense for erecting yards, kilns, sheds, &c.; and I should think he had made and burnt from seven to eight hundred thousand bricks, for which, I understood, he received from Potter a very reduced price. What it was I do not know; but was informed that his losses must have been not short of from three to four thousand dollars. I afterwards assisted in working the same bricks in the fort, and found them as good, if not better, than any other bricks received in the fort; but there was strong suspicion that Blaney was concerned with Potter in that transaction; but to my own knowledge I know that Crown pressed hard on Blaney to receive his bricks and enter into a new contract, as Crown informed him that he was deficient of means to proceed farther, and it would be a ruinous thing to the said Crown. I recollect well that Blaney told Crown that his papers and voucher had been sent back from Washington, and he would make no more contracts, but purchase them from whom he pleased. There is one other

circumstance of a number of blacks being hired from their masters in the country to work as laborers in the fort, and drew their own rations, and received a high price ; and it was also said that Captain Blaney received a part of the profits. From certain circumstances, I believe it to be the fact, for he got rich fast.

Z. H. HAWKINS.

The foregoing certificate was sworn to before me, this 10th of March, 1836.

THOMAS WILLIAMSON,
Alderman, Borough of Norfolk.

DISTRICT OF COLUMBIA, }
Washington County } ss.

Appears before me, a justice of the peace in and for this county, David Hepburn, a competent witness, and made oath on the Holy Evangely of Almighty God, that he was employed by Captain George Blaney, from Fortress Monroe, to go to North Carolina, in the month of November, 1826, to work at his trade as bricklayer on a fort at Oak island, in the said State, under the direction of the said Captain George Blaney ; and that he did work into the said fort bricks that he found there and was informed were made by Thomas Crown ; and the said bricks were, in size, about the same made in the city of Washington.

Given under my hand and seal this 31st of January, 1828.

JOHN CHALMERS. [L. s.]

HOUSE OF REPRESENTATIVES—*May 5, 1846.*

The Committee of Claims, to whom was referred the memorial of Thomas Crown, report:

The memorialist states, that in 1826 he made a contract with Capt. George Blaney, acting for the government of the United States, for the delivery of 3,000,000 bricks at Oak island, on the Cape Fear river, in North Carolina—viz: 1,000,000 on or before the 1st of October, 1826, 1,000,000 on or before the 1st of November, and 1,000,000 on or before the 31st of December, 1826—to be used in the construction of the fortification at that place, for which he was to receive \$23,250, being at the rate of \$7 75 per thousand, and that he was to be paid as the bricks, or any part of them, were delivered ; that he immediately made the necessary arrangements and preparations, which subjected him to considerable expense, and commenced the making of the bricks according to his contract ; that in July he was prepared to deliver 800,000 bricks, and did deliver 5,000, and would have been able to fulfil his contract to the letter and spirit, but for the interference of the said Captain

Blaney, and his refusal to receive the bricks ; that he was compelled by Blaney to sell the bricks which he had made to a man named Potter, and relinquish his contract ; and that the same bricks were afterwards received from Potter by the said Blaney, and used in the construction of the fortification. These facts are sufficiently proved by the testimony, and the violation of the contract on the part of the government is established. The question of damage alone remains to be adjudicated. Crown states that he sustained damage to the amount of \$6,000, but he offers no proof of the amount for which he sold the bricks to Potter which the engineer had refused to receive from him, and afterwards received from Potter, and had worked into the fortification. The difference between the price he received from Potter and the contract price, should be the measure of the damages upon this point. It appears that he had made between 800,000 and 1,000,000 of bricks, 5,000 of which had been delivered, and that he sold the remainder to Potter, who sold them to Captain Blaney. The proof is not conclusive that Potter sold all to Captain Blaney, but there is sufficient evidence that the bricks made by Crown were as good as any that were used in the fortification, and should have been received. There is no proof of the amount paid by Potter to Crown for those bricks, and the committee are left to conjecture as to the amount of damage thereby sustained. But it is stated upon oath that he (Crown) received but \$600, and that his actual loss was \$6,000. If he received but \$600 for the bricks sold to Potter, it is reasonable to suppose that that sum, and the loss, with the interest upon the amount, would now be much more.

The committee have thought proper to order that the principal documents should be appended to the report, for the consideration of the House. A bill for the relief of the petitioner is herewith reported to the House.

No. 1.

Case of Thomas Crown, upon his contract with Captain Blaney, superintending engineer, to deliver the bricks requisite for constructing the fort at Oak island.

Certain questions touching the law of contract, and presenting an obstacle at the threshold to the liquidation of Mr. Crown's claim under this contract, are alone submitted to my consideration for a professional opinion.

The general authority of Captain Blaney, as superintending engineer, to contract for the work and materials requisite for the construction of the fort, seems undisputed and indisputable. But the objections to the claim are, first, such as originated with the Engineer Department itself, going to assert the *nullity* of the contract itself on its face, in consequence of supposed defects and vices in its frame and terms ; secondly, objections and difficulties originating with Captain Blaney himself, after he found it expedient to devise apologies and excuses for breaking up the contract and dismissing Crown from employment.

The two sets of objections are wholly distinct from each other. Those raised at the department were, of course, never thought of or imagined by Captain B., but go to supersede and annul his act, because of his supposed want of skill to frame a sufficient and valid contract. Those subsequently raised by him were equally new to his superiors, and do not appear ever to have been thought of at the department till suggested to it by him, after he received its objections to the frame of his contract, and had been supplied with other motives for ridding himself of all connexion with Crown.

The contract was solemnly executed, pursuant to preliminary proposals, made and accepted on the 16th March, 1826. It was not till more than four months thereafter, nor till after Crown had, at vast expense, entered upon the actual performance of the contract, laid out his capital in expensive and laborious preparations adequate to the complete execution of his undertaking, and actually delivered *in advance* a portion of the bricks contracted for, that the notable discovery is made at the department, and thence communicated to Captain B., in a letter from Captain Smith, dated July 26, 1826, of such fatal defects and vices in the frame of the contract itself as gave it a one-sided operation—such an operation, in short, as bound the government to pay the stipulated price of the bricks, delivered or not delivered, without any reciprocal legal obligation on Crown to deliver the article for which he was to receive payment! So far as Captain B.'s skill as a conveyancer is in question, it seems to me that it would have required far more skill to have drawn a contract with this one-sided operation than one of mutual obligation. Our wonder, at the first blush of such an objection to the contract, is raised to utter astonishment upon a simple reading of its terms; where it is seen at once that Crown distinctly and positively covenants for the delivery of the entire quantity of bricks in several parcels and at specified times; that the size and quality of the bricks are carefully prescribed, with an express provision for subjecting them to an *inspection* from a government agent before they shall be received and paid for; and that the *actual delivery* of bricks of the prescribed size and quality, and so passing inspection, is made a *condition precedent* to the payments stipulated on the part of the government. The most skilful and experienced of professional scriveners could not have devised a contract of more complete reciprocity in its terms, nor have made the payments stipulated for on the part of the government more absolutely dependent on the condition precedent of performance on the part of Crown.

If astonishment go so far as to raise a doubt in one's mind whether the Engineer Department could have gravely put such a construction on the contract, the above-cited communication from Captain Smith needs but a careful examination to see this objection, of the want of reciprocity, and of the one-sided operation of the contract, there broadly, distinctly, and unequivocally stated and urged, to the effect of making out the contract a nullity *ab initio*. I could scarce credit the first impression on my own senses from Captain Smith's letter; and it was only after repeated and more careful perusal that I found myself compelled to yield to its too plain and unequivocal import. (See Doc. No. 8, 21st Congress, 1st session, page 5.)

The only reason for this strange deduction from the terms of the contract is distinctly stated, and hinges merely and exclusively on the omission of a *pecuniary penalty* or *forfeiture* to be exacted of Crown in case of his failure to comply with the contract. A pecuniary penalty or forfeiture, reserved either in the body of the contract itself or in a collateral bond conditioned for the performance of the contract under a certain penalty, is distinctly assumed as indispensably necessary to give the contract a *binding effect* on Crown, and to afford the government a legal remedy against him for any breach of contract he might commit, and as equally necessary to protect the government from a one-sided operation of the contract, binding them to pay the stipulated price of the bricks, whether delivered according to contract or not. I need not insist on the strange ignorance of the obvious and familiar law of contract that this motion argues, nor upon the equal efficacy of a simple covenant, without as with a penal sanction. It would be equally superfluous to attempt, at this time of day, to instruct any well-informed man, in or out of the profession of the law, how utterly useless such penalties have become. Even in the strictness of ancient times, where they were recoverable at law, the courts of equity always interposed to relieve against them, upon just compensation being made for the breach of contract. But the time has long passed since they were recoverable even in strict law. The only effect of the penalty is to give the party grieved an option between two forms of action—debt and covenant; and in either form of action the result is precisely the same—a mere recovery to the amount of the *actual damage* sustained by the breach of contract. The penalty is now universally liquidated by an assessment of the actual damage; and such assessment must be precisely the same, whether the form of the action be debt or covenant.

A minor objection to the mere detail of the contract is stated in the said letter from the Engineer Department—something about the aid to be furnished by the government in the reception of the bricks being too *indefinitely stated*. The bearing or importance of this objection is not perceived. But it is not started as one at all affecting the validity of the contract; and if there were anything material in it originally, it was rather too late to think of it after the contract had been more than four months in actual operation, and in a regular course of practical execution. It seems never to have entered the mind of the Engineer Department that any of these objections went to the monstrous injustice of a total renunciation of the contract, and of a discharge of the contractor from public employ. The aforesaid communication from the department, signed by Captain Smith, concludes with a recommendation that, “the contract, as it is, being a *nullity*, it will be necessary to *modify* it to make it *binding*, or, perhaps, it would be better to make a new one;” and, in truth, Mr. Crown never thought of making any difficulty about a modification and reform in the terms of the contract in the particulars indicated in the communication from the Engineer Department; though clearly not bound, at that period and under the then circumstances of the parties, to submit to any arbitrary modification, he was ready without hesitation to acquiesce; he had no objection to the annexation of a

penalty in either of the forms proposed, nor to a more definite stipulation about the aid to be afforded in the delivery of the bricks. No difficulty whatever arose upon either of those points. But *new and before unthought-of* difficulties were raised by Captain B. after he received the above-mentioned communication from the department, and eventuated in driving Mr. Crown from his undertaking, and compelling him to abandon his contract, in order to get rid of the embarrassments and difficulties thrown in his way by Captain B.

This brings us to the more particular consideration of the new difficulties and objections started by Captain B. in July and August, 1826, and then started for the first time, soon after he had received the communication from the department condemning the frame of the contract. These are found originally stated in an official report from Captain B. to the Engineer Department, dated August 9, 1826. (See the above-cited Doc. No. 8, pages 3 and 4.) The same topics are reiterated, with some variation and considerable aggravation, and transmitted by him some years afterwards to the then chairman of the Committee of Claims, Mr. McIntire, with the original contract and some other documents thereto annexed, and now among the papers before the present committee. The more material of his allegations against Mr. Crown, and by which he attempts to justify the measures by which he ultimately succeeded in driving Crown to an abandonment of the work, may be summed up as follows :

1. He alleges that the contract was never *consummate*, but was only *inchoate*, in consequence of a collateral stipulation or condition *verbally* understood and expressed at the time of its execution, that it was *not to be binding* till Crown had furnished two sufficient *bondsmen as sureties* for his performance of the contract; and that, as Crown never complied with this condition, the contract was never *binding* and *operative*.

This allegation rests entirely upon Captain B.'s *ipse dixit*. He does, indeed, refer to a Lieutenant Tuttle, who, he says, was present and knew the fact; but this gentleman has never been called to verify the assertion. Mr. Crown has positively denied it; though, when required, four or five months after the execution of the contract, to furnish these bondsmen, he passively acquiesced, overborne as he was by the power over him, which Captain B. seemed to arrogate, in consequence of the actual contract having been declared a nullity by the department; and he proposed to give such bondsmen, if allowed a reasonable time to procure them. This argues nothing to prove that such a condition was annexed to the *original* contract as *actually signed*, but a mere *concession* of a man supposed to be in the power of others, helpless to resist their requisitions, or unable to make a stand against them, without involving himself in ruin, and called upon to enter into a *new* contract, with new stipulations and modifications, in consequence of the erroneously-assumed nullity of the contract already executed.

That this condition of "*bondsmen*" (so called) was a mere *after-thought* of Captain B., after he received the communication from the department, dated July 26, 1826, and not an original condition annexed to the contract, and, even if it had been so, that it was afterwards entirely waived and given up, are propositions perfectly clear,

in my opinion, from the documents and notorious circumstances in the case.

In the first place, as the contract called for no advances of money to the contractor, there was no occasion for such bondsmen. They were not required of the contractors for *stone*, nor subsequently of Potter and others under contracts for the same bricks Crown was to have supplied.

Then, looking to the terms of the contract itself, and of the documents connected with its formation and execution, we see the whole substratum of the contract *excluding* such a condition. Then, looking to see how the contract, after its execution, was treated and considered by the parties to it, and carried into *actual operation*, and continued to be so treated and considered four or five months without hint of any such condition, it appears to me proved, beyond the possibility of doubt, that it was considered and treated and acted on, by all the parties to it, as a *consummate*, not as a merely inchoate or incomplete contract, and, therefore, either that no such condition was ever annexed, or, if annexed, that it had been waived and given up by common consent. I think, however, the internal evidence all goes clearly to the conclusion that the condition never existed at all, but was an afterthought, and was most unjustly and oppressively imposed on the contractor.

I will now concisely refer to the documents and notorious circumstances that establish this conclusion.

Captain B.'s original advertisement (No. 1) inviting *proposals* for the contract, though it goes into some details as to the *conditions* of the proposed contract, is absolutely silent on any such condition as bondsmen, and in legal construction, as well as by the common sense and practice of men in such cases, *excludes* such a *condition*.

Captain B.'s letter, (No. 2,) 16th March, 1826, to Mr. Crown, *unconditionally accepting* his proposals, with some reservation of a contingency as to the quantity of bricks to be contracted for, equally *excludes* such a *condition*.

Captain B.'s original *list*, reported to the Engineer Department, of the proposals he had received in consequence of his advertisement, notes the *unconditional* acceptance of Crown's proposals, and formally and officially certifies to the department "that the *contract entered into* between T. Crown and himself for the delivery of 3,000,000 bricks, &c., *was made* on the most favorable terms." (See printed Doc. No. 8, p. 6.) Here the contract is reported and treated in terms, at the time of its execution, as entirely consummate; as a contract "*entered into*"—"made."

Then a copy of the contract, *in extenso*, is transmitted by Captain B. to the department, as a consummate and binding instrument, without the remotest suggestion or hint of any condition yet to be performed in order to give it effect.

When the department comes to notice the contract, (a copy of which had been so reported and transmitted by Captain B.,) and to state objections, these objections equally exclude any inference or hypothesis of there being such a collateral condition yet to be performed as Captain B. afterwards suggested. All the objections of

the department turn exclusively upon the intrinsic terms of the instrument itself; it is clear that (those objections being removed) the department viewed the contract as consummate and unexceptionable in all other respects. A mere *penalty* was all that was thought necessary to give *binding effect* to the contract. What is there said about a *collateral bond* has no reference whatever to collateral *sureties* to the bond; it is only one of two modes proposed for giving the contract the sanction of a mere *penalty*; and either mode would equally have satisfied the department—either a penalty reserved in the body of the contract, or a collateral bond conditioned for the performance of the contract. Neither of these, the one more than the other, imports that *bondsmen* or *sureties* are required. By placing the *collateral bond* on the same footing as the mere reservation of a penalty in the body of the contract, the idea of *sureties* is absolutely excluded. Indeed, it is impossible to read Captain Smith's letter without seeing plainly that the idea of bondsmen or sureties never entered the mind of the Engineer Department.

Again: Mr. Crown, being in want of some pecuniary aid to execute the work he proposed to undertake, obtained from Mr. Leckie a loan of \$800 in anticipation of his proposals being accepted, proposing to refund the loan out of the money to be received on account of his bricks. Accordingly, Mr. Leckie, on the 2d of March, 1826, wrote a letter to Captain B., highly recommending Crown, and wishing to know whether, if he obtained the contract, Captain B. would honor his draft for the \$800; to which Captain B., on the 16th March, 1826, (the very day the contract was executed,) answers that he will "*accept and pay the order of Mr. Crown for the sum mentioned, or for any other sum, whenever he shall deliver bricks to the amount of the order.*" Now, here, the mere *delivery* of bricks is made the only condition of accepting and paying the draft; and if there were really no binding contract at the time, but the whole rested upon the performance of the condition of giving bondsmen, must not Captain B. have further qualified his promise to accept and pay by the proviso that Crown *consummated* the contract, and, in fact, became the *contractor* for the delivery of the bricks? The terms of the answer to Leckie clearly recognise Crown as contractor in fact at that time, and exclude every other qualification of the acceptance and payment of Crown's order except that of the actual delivery of bricks *according to contract*. (See the correspondence between Captain B. and Leckie, annexed to Captain B.'s aforesaid statement to the former committee, C. D. No. 4.)

The admitted facts already adverted to are conclusive of themselves. Crown had, in due time, established his brick manufactory on an adequate scale; had, by the month of July, and long before Captain B. raised this difficulty about bondsmen, actually manufactured 800,000 bricks, being within 200,000 of the amount of the very *first delivery*, which, according to the contract, was to be 1,000,000 delivered on the 1st October; so that he had taken time by the forelock, and had four-fifths of the quantity ready three or four months beforehand; he had actually delivered 5,000 of the bricks as early as *June*, four months before the time fixed for the first delivery.

Here, then, is part execution by *both parties* of a contract which had been standing, with all the *solemnities* of a consummate instrument, for more than four months, which had been officially reported, and all along acted on during that period as a consummate contract, without whisper or hint from any quarter that it depended for its *binding effect* upon any collateral condition whatever. Under these circumstances, and after all this lapse of time, the parties, one and all, would have been absolutely *estopped* (if I may use a technical term) in a court of law to deny the consummate execution and binding force of the contract; and, therefore, all evidence of any collateral condition about bondsmen would have been excluded; or, if such evidence had been admitted, the court would unquestionably have instructed the jury that a waiver and abandonment of the condition ought, under the circumstances, to be *presumed*. But I am clear in the opinion that, upon the strictest legal principles, such a condition, if fully proved according to the statement of Captain B., would have been nugatory and *void ab initio*; that, independent of the circumstances of the subsequent recognition and part execution of the contract already adverted to, the supposed condition never could have operated one instant to suspend the consummation and binding effect of the contract. The soundest and most universally admitted principles of law would have forbidden it. No written contract, especially a contract under *seal*, can be in any manner varied or modified by setting up any *parol* contract, condition, or understanding, as collateral to it. The seal contract is a complete *estoppel* (as the legal phrase is) to any pretence of other terms or conditions but what the contract expresses on its face, or necessarily implies by the fair construction of its terms. True, a deed may be delivered to a *third person* as an *escrow*, subject to regular delivery *in futuro* to the party, upon performance of a parol condition, proved by parol evidence; but it never can be treated as an *escrow* after solemn execution and delivery to a *party*. Once *delivered by consent* of parties, and it can no longer be an *escrow*, but instantly becomes consummate and absolute. Here there is no pretence, or shadow of a pretence, for treating this contract as an *escrow*. It was regularly executed and delivered to the *party*; treated and acted on by both parties for more than four months as a consummate instrument; actually carried into practical effect and operation by both, and in part *performed* as a *consummate and operative* contract.

Escrow being out of the question, the whole pretence of a collateral parol condition about bondsmen is absolutely impertinent and nugatory.

If, however, the question could in any manner be made to turn on the *fact*, or on parol evidence of the fact, of such a condition having been originally agreed to *verbally* at the time of the execution of that contract, the fact could not be said to be satisfactorily established by the statement of Captain B.

He refers to evidence in corroboration of his statement, never to this day produced—the evidence of Lieutenant Tuttle. His statement, being the statement of a *party*, is met by the positive denial of the other party. It is inconsistent with, and most conclusively re-

pelled by, all the facts and circumstances preceding, accompanying, and following the execution of the contract; inconsistent with all his own sayings, actings, and doings, for more than four months after the execution of the contract. The pretence is set up at a time (July or August, 1826) when he had a *new* motive and a direct interest to imagine and trump up some apology for his conduct. The contract which he had drawn and executed had been condemned by his superiors as so negligently or ignorantly drawn as to have imposed an obligation on the government to pay the price of the bricks, without any reciprocal obligation on Crown to deliver them. Manifest as was the absurdity of this notion, he had an obvious motive and an interest of professional pride to clear his skirts of the gross ignorance and negligence implied by the objections to his contract urged by his superiors; and this he attempts by the almost equally absurd pretext of Crown's original stipulation to give a collateral bond, with sureties, and of a mutual understanding that the contract was to remain unconsummated and suspended from all binding effect till such bond and security were given; though he most inconsistently admits, or clearly shows, that it was in the meantime carried into practical effect and operation, without an instant's delay; as if a contract could *operate*, and be carried into execution as such, whilst it stood suspended and was no contract, but a mere *project* of contract, waiting for some act to be done before it could operate as a contract.

I say nothing of the more interested and corrupt motives attributed to him—and under a strong suspicion of which he appears to have labored at the time—of a secret participation with Potter in the profits of the contract with that person, when it was contrived to bring him in to supersede Crown in the business.

2. Captain B.'s next charge against Crown is, that of the 800,000 bricks which he admits had been manufactured between March and July, there were only 250,000 fit to pass inspection, and to be worked up in the fort.

Now, admitting for a moment this charge to be true in its terms, what does it amount to, and how may it possibly affect Crown's rights under the contract, or establish against him anything approaching a breach of contract? This immense quantity of bricks had been manufactured so early as July, at least three months *before* the time (1st October) when Crown was *bound* by the contract to deliver any bricks at all—one-third of the whole, that is, 1,000,000, being deliverable on the 1st October, one-third on the 30th November, and the remaining one-third on the 31st December. All that might be delivered any time before the 1st October, depended entirely on Crown's own option; nothing can be clearer from the terms of the contract than this—that he was not *bound* to deliver a single brick until the 1st October, 1826, but might, at his option, deliver them any time before. Then, if it were clearly proved that in July, 1826, 550,000 of the bricks then burnt were unfit to be received, he had abundance of time before the 1st October to make up the deficiency, and could be charged with no sort of default under his contract before the last named period.

But is the fact satisfactorily proved, by any means, that the bricks

which Crown had ready for delivery by the month of July, 1826, were of the bad quality represented by Captain B., in the proportion of 550,000 to 800,000?

For this fact, again, we have nothing but Captain B.'s *ipse dixit*. He produces no actual *inspection* and *condemnation* of the bricks, nor any other sort of evidence to corroborate his statement; but he is most powerfully, if not conclusively, contradicted in this fact by the positive evidence of several credible and unsuspected witnesses, and by several cogent *circumstances* appearing in the case.

Alfred Emerson proves he was present when Captain B. refused to receive the bricks, and that his refusal was grounded *not* on any alleged defect in the *quality of the bricks*, but expressly on an alleged defect in the *contract* between him and Crown. The particular defect in the contract alleged by Captain B. is not recollected by the witness; but it must have been either the absurd one pointed out by the Engineer Department in Captain Smith's letter, or else the newly set up pretext of Captain B. himself, of the want of bondsmen.

Three other witnesses, James H. Henry, David Hepburn, and a person whose deposition was taken at Norfolk in March, 1836, Z. Hawkins, [Nos. 7, 8, 9,] all expressly prove the good quality of the bricks; and further prove the damning fact, that the very same bricks which Captain B. affects to condemn as of bad quality in the hands of Crown were immediately afterwards accepted of Potter as good bricks, and actually worked into the fort, after poor Crown had been compelled, by the chicaneries of Captain B., to sell the bricks, at a reduced price and at a cruel sacrifice, to Potter, and let him take his (Crown's) place as contractor for bricks. They further prove that these very bricks were of better quality than those afterwards manufactured by Potter, and accepted as good bricks, and worked into the fort. These three witnesses had the best opportunities of observing and knowing the facts to which they testify, as will be obvious from a reference to their depositions, and to their employment as artisans on the work. One of them, Henry, had been employed by Crown as a brickmaker in his yard, and was afterwards continued in the same employment by Potter after he took the yard. The fact, therefore, was within his personal observation and certain knowledge; he could not be under any honest mistake; the facts he proves must be true, or he perjured. So the other two witnesses, Hepburn and Hawkins, were both *bricklayers*, employed by Captain B. on the construction of the fort; their means of personal knowledge of the facts testified by them equally exclude any possible presumption of honest mistake.

General Gratiot, indeed, in his letter to the Secretary of War, dated 20th February, 1829, [see the above-cited document, No. 8, p. 2,] does make a suggestion benevolently intended to ease off Captain B. from this damning fact. "With respect," he says, "to the statement that Captain B. purchased afterwards from Mr. Potter the brick which he had refused to receive from Crown, there is no other evidence than that contained in the papers furnished by Mr. Crown; and, *without impeaching the veracity of either of the deponents to that fact*, it is evident that the one may have been *misinformed* as to the *identity* of the bricks purchased from Potter, and that the other may have worked up in the fort bricks *made by Crown*, since there is evi-

dence of *purchases* having been made from *him* by Captain B." Now, this hypothesis, in both its branches, is purely gratuitous ; nay, gratuitous as it is, General Gratiot has clearly misapprehended the force and bearing of the evidence. Henry, the first witness to whom he alludes, does not speak on *information* at all, but on personal knowledge, and obviously with the best means of personal knowledge. What ground, then, for the general's hypothesis of "*misinformation*?"

As to the other hypothesis upon which the general accounts for possible error in the evidence of the two other witnesses—namely, that the bricks of Crown's manufacture, which they speak of having worked up in the fort, were only those which Captain B. had purchased of Crown himself, not those sold by Crown to Potter, and by him afterwards delivered to Captain B.,—it is evident the general has inadvertently fallen into some confusion and misapprehension respecting the evidence. He speaks of "evidence of *purchases* having been made from him (Crown) by Captain B."

Now, what "evidence of purchases" can be here alluded to? The only purchase from Crown, that is, the only delivery of bricks by him, was of the small quantity of 5,000 delivered so early as the 28th of June, the month before his establishment was turned over to Potter ; yet the General speaks of "*purchases*" indefinitely. It has struck me that he may possibly have been misled by some similitude in the appearance of two different names as they are written in Mr. Hagner's statement (No. 10) of bricks purchased and paid for by Captain B., where may be seen in the same list the names of Thomas Crown and Thomas Cowan ; the first being put down for 5,000 bricks delivered on the 28th June, 1826, the last for 286,000 in January, 1827, long after poor Crown had been driven off by the intrigues and chicaneries practised against him.

However this be, the least careful examination of the depositions must put it beyond the range of any moral or legal probability, and of any rational presumption, that these witnesses could have confounded the 5,000 bricks delivered by Crown in June, 1826, with those delivered by Potter after he had displaced Crown. One of them, Hepburn, was not employed on the work till November, five months after the 5,000 bricks had been delivered ; and the others, though employed from the beginning—the one in the brick-yard, the other on the masonry of the fort—show, in the whole context of their evidence, too plainly to be misunderstood, that they speak, with intelligence and discrimination, of the bricks delivered by Potter after he had displaced Crown.

The statement of Mr. Hagner, just referred to, supplies matter of strong corroboration to the evidence (if it wanted corroboration) of these witnesses, as it shows that Potter had, by the 31st *July*, delivered 378,000 *hard-burnt* bricks. Now, this was almost immediately after the establishment was turned over to him, and before he could possibly have had time to manufacture and burn the bricks. [See Mr. Hagner's statement, No. 10.]

3. The last of Captain B.'s pretexts for ousting Crown of his employment is two-fold—his want of *capacity*, and his want of *means* to carry on the work.

His industry and bodily exertions are admitted, in terms, as exemplary ; his honest and persevering endeavors to perform the work are not questioned—'tis his *capacity* (meaning, I suppose, mental capacity) alone that is objected to. Now, if he had not sufficient capacity for a *brickmaker*, what could he have had any capacity for ? It was a profession which he had pursued, with success and on the largest scale, for many years, and in which he had acquired the largest experience. If, in all that time and with all that experience, he had not capacity to learn such a mechanical profession, and to acquire competent skill in it, he could have had no more brains than one of his own bricks ; absolute and hopeless idiocy, at least, must be imputed to him. The very practice and experience he is proven to have had in the business, must have evidently qualified him for the undertaking, supposing him not to be a born idiot. He had been most extensively employed in this city and other places in the very business of conducting the practical operations of brick-yards on the largest scale ; and, among other undertakings of the same kind, had manufactured the bricks for Fort Washington. Yet, with all this long and diversified experience, after the great number of most competent judges with whom he had come in contact in the course of his business had vouched his capacity and fitness, Captain B. is the very *first* and the very *last* who pretends to have detected any want of capacity.

His capacity, indeed his eminent qualifications, from long and large experience, for the business, are vouched for by numerous witnesses, themselves most competent judges and of unquestionable veracity. The late Robert Leckie alone, if all the others were out of the way, would be sufficient to annihilate the assertion of Captain B. on this point. Mr. Leckie was one of the most respectable in point of character, and one of the most skilful and best instructed of our mechanics—indeed, a general architect of respectable standing. To his are added the positive, unequivocal testimonials of many gentlemen ; some of whom from their professional pursuits as military engineers, others from their experience as employers of mechanics to furnish materials and execute brick-work, may be considered as eminently qualified to judge of the matter ; and I will, therefore, simply refer to the testimonials, before the committee, of Robert Leckie, General Gratiot, Colonel Bomford, Major Wade, Commodore Rodgers, A. B. McLane, and William A. Bradley. (Nos. 11, 12, 13, and Mr. Leckie's before-mentioned letter to Captain B., dated 2d March, 1826, annexed, as exhibit C, to Captain B.'s statement.)

Captain B.'s charge of incapacity being thus trampled under foot, the very circumstance of his having urged so groundless a complaint to his superiors against Mr. Crown sufficiently evinces his evil disposition towards the individual, and the evil motives that must have actuated him in persecuting that individual out of his lawful and proper employment in the public service.

The want of *means*, which Captain B. has coupled with the want of capacity, is a complaint equally groundless, and just as completely overwhelmed by evidence in contradiction of it as the other, and in one view, perhaps, has a more malignant aspect.

The very fact that Crown had completed his brick-yards and manufacturing establishment upon such a scale as to have 800,000 bricks manufactured and ready for delivery three months in advance of the time fixed for his first delivery of bricks under the contract, does of itself refute the complaint of inadequate means. Mr. Leckie (No. 11) proves that he entered on the business with a ready-money capital of at least 1,300 dollars, 800 of which was lent by Mr. Leckie himself, and that capital backed by a fair personal credit. When he commenced operations under the contract he found no difficulty, though a stranger, in obtaining what credit he required in anticipation of his expected receipts on account of bricks. If he had been fairly dealt with by Captain B., he would have had abundant funds, and in full time, to discharge his engagements and keep up his credit. At the very time he was forced by the cavils, chicaneries, and intrigues of Captain B. and Potter to surrender his establishment, and was made to feel the pressure of pecuniary embarrassment, he was entitled to receive of Captain B. abundant funds to place him at ease. The 800,000 bricks, at \$7 75, should have placed at his disposal \$6,200 in ready money; and even if Captain B. were sustained, as he is most victoriously contradicted, in saying that only 250,000 of that quantity of bricks were fit to be received under the contract, even then the \$1,937 50, which, without any dispute, he was entitled to for the latter quantity, would have enabled him to prosecute the work with credit and advantage. But the evidence is positive and clear that Captain B., in July, refused to receive any of the bricks, but insisted on Crown's selling out to Potter.

Then the very embarrassments brought suddenly upon Mr. Crown, and the only want of means or credit ever manifested in the course of his operations, were all the direct effects of Captain B.'s chicanery and oppression; and he has the grace to set up the *consequences* of his own misconduct as the apology for that very misconduct, and as criminality of the *victim* of that misconduct.

I do not think it at all material to trouble the committee with any remarks upon any of the points in the case; but these general principles of the law of contract, and of the evidence by which the execution of the contract and the excuses for the breach of it, should be determined.

The evidence of Mr. Leckie and others will supply the data whereby to estimate the losses of the claimant, or the equitable compensations that ought, *ex æquo et bono*, to be awarded him.

W. JONES.

FEBRUARY 20, 1837.

No. 2.

OAK ISLAND, N. C., *March* 23, 1830.

SIR: In answer to your letter of the 11th instant, I now enclose the original contract entered into between Mr. Thomas Crown and myself, for the delivery of three million of bricks for the fortifications

under my superintendence at this place, marked A. This is the copy of the contract which was forwarded by me to the chief engineer, and which was not sanctioned or approved by him. The letter marked B is a copy of one received from Captain J. L. Smith, who was then the assistant to the chief engineer, and contains the objections held by the Engineer Department to the contract. It is proper to observe in this place that no penalty was expressed in the contract, because it was intended to send a bond with it, but which was not done, owing to the delay of Mr. Crown to name his bondsmen. About the middle of July, 1826, four months after the contract was entered into, Mr. Crown named as his securities Col. Bomford and Major Wade, of the United States army, neither of whom, however, had, as I understood from them afterwards, ever given him any authority to do so. It was distinctly understood by Mr. Crown that the contract was not to be considered binding on either party until security was given by him for its faithful performance.

Having obtained leave of absence for a short period, I met Mr. Crown in Fayetteville, either the last of March or early in the month of April, 1826, on his way from Washington city to Smithville, for the purpose of commencing the brick-making business; and in a conversation which I had with him at that time, he stated to me that his means were ample; that he had made an arrangement with the Branch Bank of the United States at Washington to discount his paper, and that he could procure from that institution funds enough to enable him to go on with the contract. I beg leave to refer to the paper marked C, and my answer thereto, marked D. He also stated to me that he had sent by water fifty or one hundred laborers, (negroes,) with provisions to last them at least six months, when the truth was that he had four men and one boy only, and not over one month's provisions for that limited force. These facts were made known to me while I was in Philadelphia by Lieutenant Tuttle, of the corps of engineers, who was then my assistant. He declared his belief of Crown's inability to perform his contract for the want of capital to employ the requisite force.

About the 20th of June, 1826, I returned to my station, and soon after visited Crown's brick-yard, to make an inspection of his work, and to satisfy myself of the probability of his being able to manufacture the number of brick which he had contracted to deliver. I found that, instead of the brick being manufactured of *pure clay*, as was to have been done, agreeably to the directions given to Crown by myself and Lieut. Tuttle, he was making them of a mixture of loam, clay, and sand; and that, out of one or two kilns which he had burnt, there was nearly a total loss, 5,000 only being of a quality fit to be received. These were received, and Crown was paid for them at the rate stipulated in the contract, (E,) though I did not conceive myself to be bound to receive one single brick until security had been given for its faithful performance, and until the contract should be approved by the chief engineer.

Crown became much embarrassed in his circumstances, and applied to me for an advance of \$1,000 to \$1,500, which it was not in my power to comply with, as the law prohibits advances on contracts;

and on the 31st July or 1st August, 1826, he, without advice or persuasion on my part, came forward and voluntarily relinquished his contract. The letter of Capt. Smith, (marked B,) returning the contract, was written on the 26th July, 1826, and received here on the 5th August, 1826. Crown relinquished the contract on the 1st of August, 1826, *and knew nothing of the objection urged against the contract until I informed him thereof, four or five days after its relinquishment.* When Crown came forward and relinquished the contract, he stated his reasons for doing so, and, to the best of my recollection, they were as follows: That he could not get bondsmen, and that he had no means of his own to enable him to pay his hands, and such other expenses as were necessary. This explains why another contract was not drawn, free from the objections entertained by the Engineer Department to the one which had been entered into.

Relative to the non-reception of Crown's brick, it is not true that I refused to receive the brick which he had made. The number stated in my letter to the chief engineer is an error; 500,000 should have been the number in lieu of 800,000. I did receive 5,000 from him, and that is the whole number which he ever delivered here. I did refuse, however, to advance him the sum that he wanted, and receive the brick at the yard; and my reason for doing so was, that the contract stipulated that they were to be delivered by Crown at Oak island. If I had consented to have received them at the yard, it would have been a breach of contract; and, besides, Mr. Potter, to whom Crown owed a considerable sum for advances made to him, would not let them be removed until Crown gave him security for the sum which he owed him. This is the true reason why Crown did not deliver them.

The day on which Crown gave up the contract, or a day or two after, he called on me, and informed me that he had endeavored to sell what brick he had on hand to Mr. John K. Holmes, who was prevented, I understood him to say, from closing the bargain, in consequence of Mr. Potter refusing to let the brick be removed from his land until he (Crown) should pay for the advances made to him in money and labor by Potter. He told me that he would try to effect a settlement with Potter; and not long afterwards came into my office with Mr. Potter, and told me that the bricks were disposed of to him, for the purpose of enabling him (Crown) to close all his business previously to his leaving this section of country. The only difficulty in the final settlement of their accounts was the price which I was to allow Potter for the brick, as there was a risk in Potter's taking the brick and selling them for the price which Crown was to have received by the contract, viz: \$7 75 per thousand.

On a full consultation with the parties, in which Lieutenant Tuttle, of the corps of engineers, then my assistant, participated, it was determined to allow Potter \$8 50 per thousand for all the good brick. This price was fixed upon with the full approbation of Mr. Crown, and with a view to his benefit alone, for it enabled him to pay Potter all he owed him, and to receive a sum of money (the amount not known by me) from Potter. Crown expressed his gratitude for the liberality

which I had manifested towards him. Out of these brick Potter delivered about 250,000.

Previous to this transaction, nearly a million of small brick had been purchased of Potter by Lieutenant Tuttle before I came here. These brick contained sixty-four cubic inches each, for which \$7 50 per thousand was paid, by the express authority of the chief engineer. These small brick were made the basis of calculation for establishing the price of those which Crown had sold to Potter, containing eighty-three cubic inches, and which, at the same rate of the small brick, would have been worth \$9 72.6 per thousand. Crown, himself, proposed that I should allow Potter \$9 per thousand for them.

The only contract that I have had for the delivery of bricks at Oak island was the one with Crown. He did not transfer that contract to any person whatever. He gave it up unconditionally, and for the reasons before stated. All the brick, except those referred to above, which have been used in the work, have been purchased without a contract, and have varied in price from \$4 to \$10 per thousand, according to size and quality.

You request me to state what assistance I rendered to Crown. The payment to him for the 5,000 bricks, when it strictly should have been made to Mr. Leckie, of Washington, and to whom I conceived myself individually responsible for the amount, (\$86 75), is one instance. Permitting him to proceed at all with his contract after he deceived me as to his means of carrying it on, or until the security for its performance was given, is another instance. Also, in the settlement of a difficulty between him and Potter, when I inspected the brick-yard, by which Crown was saved the mortification of being driven off from the brick-yard by Potter, who had called his negroes for that purpose.

I have the honor to be, very respectfully, your most obedient servant,

GEO. BLANEY,

Captain Corps of Engineers.

Hon. RUFUS McINTIRE,

Of the Committee of Claims, &c., &c.

Sworn to before me.

SAM. POTTER, J. P.

No. 3.

A.

Articles of agreement made at Smithville, North Carolina, on the sixteenth day of March, in the year of our Lord one thousand eight hundred and twenty-six, between George Blaney, captain of the United States corps of engineers, superintending the construction of the fortification at Oak island, near the mouth of the Cape Fear river, in the State of North Carolina, of the one part, and Thomas Crown, of Shepherdstown, in the State of Virginia, of the other part.

This agreement witnesseth, that the said George Blaney, for and

in behalf of the United States of America, and the said Thomas Crown, his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree to and with each other, as follows, to wit:

1st. That the said Thomas Crown, his heirs, executors, or administrators, shall deliver at the United States wharf at Oak island, near the mouth of Cape Fear river, three million bricks, in the manner following, to wit:

One million on or before the first day of October, 1826; one million on or before the thirtieth day of November, 1826; and the remaining one million on or before the thirty-first day of December, 1826.

2d. That the said three million brick shall be manufactured of such clay as shall be approved by the engineer superintending the fortifications at Oak island, and shall be made in moulds of the standard size adopted by the corporation of the city of Washington; that is to say, the brick, when moulded, shall measure nine and one-eighth inches in length, four and five-eighth inches in breadth, and two and five-eighth inches in thickness.

3d. That the said three million brick shall be all hard-burnt, and shall be subject, on inspection, to approval or rejection by an officer of engineers, or such person as shall be appointed by the superintending engineer of the fortifications constructing at Oak island, for that purpose.

4th. That the said Thomas Crown, his heirs, executors, or administrators, shall be entitled to receive from the United States, through the hands of said George Blaney, or such other officer of the United States as shall be duly authorized, for the brick delivered by virtue of this contract, the sum of twenty-three thousand two hundred and fifty dollars, lawful money of the United States, being at the rate of seven dollars and seventy-five cents for each and every thousand brick.

5th. That the said Thomas Crown, his heirs, executors, or administrators, shall be entitled to receive from the United States, in the manner stipulated in the preceding article, on the delivery of any part of the said three million of brick which shall have been inspected and approved by the person designated by the superintending engineer of the fortifications constructing at Oak island, a sum corresponding with the quantity actually delivered, at the rate established in the foregoing stipulation.

In testimony whereof, we have hereunto affixed our hands and seals the day above written.

GEO. BLANEY, *Capt. Eng's.* [L. s.]
THOMAS CROWN. [L. s.]

Signed, sealed, and delivered in presence of—

JOHN H. HOLMES.

JOHN BROWN.

It is understood that the United States are to furnish hands to receive the brick as they shall be tossed or thrown from the vessel by the contractor.

GEO. BLANEY, *Capt. Eng's.*

No. 4.

SMITHVILLE, *March 22, 1830.*

Having been called on by Captain George Blaney, and requested to state in writing what I recollect of a contract made between him and a Mr. Thomas Crown, and all the circumstances connected therewith, they were, to the best of my knowledge, as follows :

Some time in the winter of 1826, Mr. Crown arrived at Smithville ; made a contract with Captain Blaney to make and deliver a large quantity of bricks the next summer—the quantity not recollected certainly, but perhaps three millions, or upwards ; the said Crown visited my brick-yard, and agreed with me that the brick should be made there, on such terms as we should think equitable and right, saying that he would return to Washington city, where he had at his command all things necessary for the completion of the contract, and that in April he would return to this place with all things needful, as above stated. During his absence I employed what hands I had in cutting wood and digging clay, and such other work as was needful to prepare for the season. In the early part of April, Captain Blaney left this place for the north, and about the same time Mr. Crown arrived ; but not, as he had promised, with forty or fifty hands, a year's provisions, &c., &c. He had only four men and a boy, a small quantity of provisions, and, from good authority, I believe not more than \$100 in cash. This circumstance alarmed me ; but, as Captain B. was absent, I would not refuse Mr. C. the chance of making the bricks at my yard, as in fact there was no other place in this vicinity where they could be made at any fair price. I therefore agreed with Mr. C. to give him up the yard, with all the apparatus thereto belonging, together with all the wood I had cut, (500 cords,) with the privilege of cutting and burning as much more as would be necessary for three million bricks, for the sum, as well as I can recollect, of \$3,500, and also to hire my negroes. In pursuance of which, charge of the yard and hands were given up to him, the said Crown.

It was in vain that Mr. C. endeavored to procure the number and description of hands required to carry on the business, and most that he was able to get remained with him for a short time before they became dissatisfied and left him. He commenced burning a kiln of bricks of near 100,000, early in the progress of which it appeared to all who witnessed his management that he knew but little about the business he had undertaken, which was fully proved at the opening of the kiln ; for out of it he got but five thousand bricks which would pass inspection. By this time every circumstance seemed to portend an unfavorable issue ; and my interest being deeply involved, I watched with great anxiety the return of Captain B., believing that he would immediately avail himself of the circumstance of Crown's not having furnished the security required by the contract, to declare the same null and void ; but to my surprise and regret, on Captain B.'s arrival, (I think in June,) he still appeared to retain some confidence in Crown ; in consequence of which, he was allowed to go on until the latter part of July, previous to which, seeing his success impracticable,

I resolved to make him no further advances. His money had been long before exhausted ; his stores nearly so, and his credit entirely so ; and, with all, his health prostrated, and he involved in debt. On which, (as I understood,) he requested of Captain B. an advancement of money, or a release from the contract ; the latter of which was preferred by Captain B. It was then impossible that Mr. Crown could pay off his debts, unless he could get some money. I was then in advance, at a fair calculation, from five to six hundred dollars. He had by this time burnt three kilns more of bricks, which had not yet been opened, but were judged to be but little better than the first ; the whole quantity which were then on hand being about four hundred thousand, of which Captain B., in order to get rid of Mr. Crown, promised me that he would take all that he could possibly make do, at a small advance on the price which Crown was to have had, if I would advance to Crown \$600, which he said was the least he could do with. I was obliged to do so, for my brick-yard, hands, &c., were, as things then stood, a sinking business to me. I went on to deliver the bricks which Crown had given up to me, and Captain B. received near three hundred thousand, of which a large quantity were salmon bricks, and but few such, if any, as Captain B. has required of me ever since.

From a reasonable calculation, by the waste of wood, clay, &c., which were prepared for the season's work, and which could not be replaced in time to enable me to repair or to redeem the lost time, together with my negro-hire and advance of money, I consider that I was injured at least \$1,000 by Mr. Crown.

The foregoing is, to the best of my memory, a true statement of facts, as clearly as I am able to set them forth.

SAM'L POTTER.

No. 5.

TREASURY DEPARTMENT,
Third Auditor's Office, March 1, 1830.

SIR : At the request of Mr. Crown, and by direction of the Secretary of War, I have the honor to inform you that it further appears from the account of Captain George Blaney, the officer disbursing at Oak island, North Carolina, the following payments were made to Samuel Potter and Hayne & Potter, for bricks delivered there between the 10th of August, 1826, and 10th of August, 1827 :

1826.			
Dec. 27.	Samuel Potter, for 264,689 bricks, at \$7 50.....	\$1,985 16	
	Same.....244,590 bricks, at 8 50.....	2,079 01	
	Same..... 26,960 salmon, at 4 00.....	107 84	
Dec. 30.	Same..... 16,008 bricks, at 8 50.....	136 07	
1827.			
Feb. 26.	Same.....334,879 bricks, at 8 50.....	2,846 47	
April 18.	Hayne & Potter, for 59,720 soft, at 4 00.....	238 88	
May 30.	Same.....455,998 hard, at 8 50.....	3,875 97	
June 30.	Same.....107,840 hard, at 8 50.....	933 64	

July 31.	Same.....	173,500 hard, at \$8 50.....	\$1,474 75
	Same.....	25,080 hard, second quality, at \$6.....	150 48

Respectfully, your obedient servant,

PETER HAGNER, *Auditor.*

Hon. E. WHITTLESEY, *House of Representatives.*

No. 6.

ENGINEER DEPARTMENT,

Washington, March 2, 1846.

SIR: Your communication of the 27th ultimo, making several inquiries in regard to contracts entered into by officers under the control of the Engineer Bureau, and requesting information in the particular case of a contract with Thomas Crown, has been received, and, in reply, I have the honor to give the following answers to the questions therein propounded:

1st. Whether contracts made by officers under the control of your bureau must, "in *all* cases, be approved by the bureau, or by the department, in order to make them binding upon the United States?"

In all cases of contracts made by officers under the control of this department, the contract must be sanctioned by the Chief Engineer, in order that such contract may be binding upon the United States. The words of the existing regulation on the subject are: "No contract will be binding upon the United States, or will go into operation, until it has been sanctioned by the Chief Engineer."

2d. "Is the case of Thomas Crown an exception to this rule, or was an approval of his contract *indispensable* under the usages and instructions of the department, to its completion?" "Are all contracts considered *inchoate* until approved?"

The usages and instructions of the Engineer Department have been uniform in this respect since February, 1840, the date of the present regulations, requiring in all cases a compliance with the requisitions of said regulations. The regulations in force at the time of Mr. Crown's contract required that when the contracts were made they must be reported to the Engineer Department, "accompanied by a list of the proposals, and a certificate declaring them to have been made on the most reasonable terms that could be procured; and copies of all contracts so made must be forwarded to the Engineer Department."

And it appears, on reference to a letter from this department, signed by Captain J. L. Smith, of July 26, 1826, (a copy of which is found in House document No. 8, 21st Congress, 1st session,) that it was then the usage of the department to disapprove contracts thus transmitted for its examination, when they were not deemed to guard sufficiently the interests of the United States. It seems to me the action of the department, in pronouncing that contract a "nullity,"

is unequivocal as to the understanding it had of its own powers over contracts in that condition.

3d. "The committee also desire to know upon what grounds the bureau predicated its rejection of the claim?"

It would appear, from this interrogatory, to be the opinion of the committee that Mr. Crown had, under his contract, addressed a claim to this bureau, which had been rejected—the grounds for such objection being now asked for by the committee. I have caused diligent search to be made through our records up to the 1st of January, 1830, (a day later than that on which the Secretary of War reported the case back to the House,) without finding any evidence of such claim.

As to the view taken at that day by the Engineer Department, of the circumstances of this case, we have found no other evidence or facts than are explained in, or to be inferred from, the printed documents before referred to.

I am, very respectfully, sir, your most obedient,

JOS. G. TOTTEN,
Colonel and Chief Engineer.

HON. T. WATKINS LIGON,
Committee of Claims, House of Representatives.

No. 7.

ENGINEER DEPARTMENT,
Washington, March 18, 1846.

SIR: Your letter of yesterday, enclosing the contract of Thomas Crown, and making, in behalf of the Committee of Claims, the inquiries whether or not the contract is "drawn up in the same manner or form, and stated in the same terms and substance, that contracts for similar work under your department are usually drawn," and whether or not the contract "is such as the practice of the department has usually sanctioned," has been this day received.

Upon an examination of Mr. Crown's contract, I find it to be deficient in the following particulars, viz:

1st. It contains no certificate, by the officer, that the contract was entered into on the most favorable terms that could be procured. This certificate was required by the regulations in existence in 1826.

2d. Contracts cannot now be transferred, either in whole or in part, and must contain a statement to that effect. This does not appear to have been the case in 1826.

3d. Contracts either contain, or must be accompanied by, some provision guarantying the full and faithful performance, by the contractor, of all the stipulations of the contract. This is done either by taking the contractor's bond, with security, or by retaining from the periodical payments a certain per centage of the amount due. This usage seems to have been enforced in 1826, as would appear from an inspection of the contracts of that period, as well as from the cor-

responsidence of the Engineer Department in relation to the very contract now under consideration.

4th. Many contracts entered into about the period of 1826, as well as those of the present date, contain a provision stating that the contract is not binding upon the United States until approved by the War Department or by the Chief Engineer; and, even though the contract contained no such express provision, still it would not now be considered binding without such approval; nor is it doubted that such approval was in 1826 considered necessary to the validity of contracts.

5th. In every contract there must be inserted an express provision that no member of Congress shall be admitted to any share or part thereof, or to any benefit to arise therefrom. (See act of April 21, 1808, section 3.) This provision of the law appears not to have been enforced about the time that Mr. Crown's contract was prepared. Its non-observance was perhaps owing to the fact that its existence was at that time unknown.

Mr. Crown's contract is returned herewith.

I have the honor to be, very respectfully, your most obedient,
 JOS. G. TOTTEN,
Colonel and Chief Engineer.

Hon. T. W. LIGON,
House of Representatives.

No. 8.

WASHINGTON, *December 23, 1835.*

SIR: In compliance with your request, I will briefly note my recollection of one or two facts connected with your engagement in 1826 to furnish bricks at Oak island, North Carolina, and I do so more cheerfully in consequence of having been one of the persons who recommended you for the employment.

In my recommendation, which was at the time supported by several persons of the most respectable character, I stated that independent of your experience in brick-making, you furnished the materials and erected several houses for me; and that, in every instance, you had fulfilled your engagements promptly and to my entire satisfaction.

Some time after this recommendation, and after I had been informed of your having obtained a contract, application was made to me, I think either by or through Captain Blaney, to know whether I would become one of your sureties; and to which I answered that I could not, consistent with a fixed determination, which was, while in office to avoid any connexion with public contracts; but that, under other circumstances, I should not have the slightest objection.

With esteem, sir, your humble servant,

GEORGE BOMFORD.

To THOMAS CROWN.

No. 9.

ENGINEER DEPARTMENT, *February 10, 1846.*

In entering into contracts with individuals for the execution of work, delivery of materials, &c., it is customary with this department to retain from the occasional payments made to such contractors, a per centage of the amount due, (usually about 20 per cent.,) which is retained in the hands of the government as a guarantee for the faithful execution and completion of the contract; or to require of such contractors bond, with security, for the faithful execution of their contracts.

Where a per centage is retained, as above, the retained amount is, of course, paid over to the contractor upon the satisfactory completion of his contract.

J. G. TOTTEN,
Colonel and Chief Engineer.

Hon. T. W. LIGON,
House of Representatives.

No. 10.

WASHINGTON, *January 30, 1836.*

I have known Mr. Thomas Crown as a brick-maker for several years, and believe him well qualified to manage that business. In 1829 and 1830 he delivered bricks at Fort Monroe, Virginia, which were approved of as bricks of good quality, and suitable for permanent building.

A. B. McLEAN.

To whom this may concern :
W. A. BRADLEY.

We agree with Mr. McLean in respect to the opinion he has given of Mr. Thomas Crown as a brick-maker.

JNO. RODGERS.
C. GRATIOT,
Brig. General.

No. 11.

WASHINGTON, *January, 1828.*

Mr. Thomas Crown was employed in the erection of the United States arsenal near Pittsburg, Pennsylvania, as master brick-layer, in the years 1814, 1815, and 1816. He performed nearly all the brick-work of that extensive establishment by contract; and the work was executed in a satisfactory manner, as respects both its quality and the promptness of performance.

I state these facts from personal knowledge, as I was stationed at that post at the time, and was engaged in the supervision of the work.

W. WADE,
Major U. S. Army.

Having employed Thomas Crown in the execution of several pieces of work, I generally found him to be highly attentive and prompt in the performance of his engagements with me.

G. BOMFORD.

ENGINEER DEPARTMENT,
Washington, July 26, 1826.

Sir: Your project of operations dated the 1st instant has been examined, and is approved.

The copy of the contract with Mr. Crown, for the supply of 3,000,000 of bricks, which has been sent to the department, is decidedly objectionable. There is no penalty expressed, and no bond accompanying and referring to it. The obligation to deliver the quantity stipulated for, of the quality and at the price specified, is nugatory so far as it is capable of enforcing performance. If the whole should not be delivered, the government is bound, nevertheless, to pay the sum to which it would amount if delivered; at least, according to the letter of the contract, that construction might be put upon it. If it is not intended to take a bond for the faithful performance of the stipulations of the contract, a penalty for failure should have been specified, or a stipulation introduced for reserving a portion of the avails of the deliveries in the hands of the government, and authorizing its forfeiture in the event of a failure.

The aid the government stipulates to furnish in the reception of the bricks is too indefinitely stated. If it is intended that one hand should be furnished to receive on the shore for each gang employed in the transit of the bricks from the vessel to the shore, it should be distinctly specified.

The contract, as it is, being a nullity, it will be necessary to modify it to make it binding, or perhaps it would be better to make a new one.

I have the honor to be, very respectfully, your most obedient servant.

By order:

J. L. SMITH,
Captain Corps Engineers.

Captain GEO. BLANEY,
Captain Corps Eng., Smithville, N. C.

WASHINGTON CITY, *March 2, 1826.*

SIR: I hope you will pardon the freedom of a stranger in addressing you. The cause of giving you this trouble is briefly this: Yesterday Mr. Crown, mason, with whom I have some acquaintance, called on me and stated that there was a moral certainty that he would get the large contract for brick-making advertised for at Oak island, near

Wilmington ; and stated that he had not sufficient funds of his own to enable him to make a good start, and applied to me for a loan of \$800, to enable him to begin with ; for securing the payment of which, however, he had no other security to offer but an order on you (to be paid when bricks to that amount were delivered ;) and knowing, as I do, that Mr. Crown is sober, industrious, and well acquainted with making bricks, and believing that, for the above reasons, he is likely to give you less trouble, and do the public perhaps more justice than the general run of candidates, I feel a strong inclination to assist him, and respectfully solicit an answer from you, saying whether, in the event of his obtaining the contract, you would pay his order for \$800, to me or order, when he had bricks to that amount, or more, delivered. Your attention to this will very much oblige, sir, very respectfully, your obedient servant,

ROBERT LECKIE.

Captain BLANEY,
U. S. Corps Engineers.

SMITHVILLE, N. C., *March 16, 1826.*

SIR : Your letter of the 2d instant has been received. I will accept and pay the order of Mr. Crown for the sum mentioned, or for any other sum, whenever he shall deliver bricks to the amount of the order.

I am, very respectfully, your most obedient servant,
GEORGE BLANEY,
Captain Corps Engineers.

Mr. ROBERT LECKIE,
Washington City.

The United States,

To Thomas Crown, Dr.

1826, June 28. For 5,000 bricks delivered at Oak island,
at \$7 75 per thousand..... \$38 75

Received, Oak island, 1st August, 1826, of Captain George Blaney, of the corps of engineers, thirty-eight dollars and seventy-five cents in full of the above amount.

THOMAS CROWN.

I certify that the articles charged in the within account have been received ; that they are necessary for, and will be applied to the construction of the foundation of fort at Oak island.

GEORGE BLANEY,
Captain Corps Engineers.

SMITHVILLE, NORTH CAROLINA,
March 16, 1826.

SIR: I caused an advertisement to be inserted in the New York, Philadelphia, and Washington papers, soliciting proposals for stone, to be used in the construction of the fort at Oak island, with the view of ascertaining the comparative cost of that material, with brick, which I can get at from \$7 75 to \$8 per thousand delivered at Oak island. One proposal only has been received, and that from Mr. Howes Goldsborough, of Havre-de-Grace, Maryland, who offers it for \$1 30 per perch of twenty-five cubic feet, put on board of vessels, to be furnished by the government, for transporting it. Having been unsuccessful in the attempt to procure it for the whole work at a price that would not much exceed that of brick, I have abandoned the hope which I had of procuring the former material, excepting for the foundations, where bricks could not, in my opinion, be used without injury, as they would absorb the water which is continually percolating through the site from the ocean, and which will nearly cover the foundations, communicating moisture from one brick to another, that would extend to every part of the work, and prevent the mortar from setting, and rendering it liable to be injured by the frost, which in some seasons is severe in this climate. I have, from a conviction that stone is necessary for the foundations, informed Mr. Goldsborough that I will take a part of the stone from him, provided the approbation of the department be obtained to my chartering or hiring vessels for transporting it from the quarry here. As the stone which will be used in the foundations will be of an inferior quality to that usually used in the superstructure—*i. e.*, it will not be necessary it should be faced—there is no doubt it can be delivered here at \$4 or \$4 25 the perch of twenty-five cubic feet. To obtain the necessary supply, which will be about 3,500 perches, I propose visiting the North immediately for the purpose of chartering or hiring vessels, and shipping stone from the Susquehanna, from Chester, and from New York. It is believed that a sufficient number of vessels can be obtained near the places above-mentioned to transport the quantity required, by the first of September next. The facilities for constructing a work here are so few, that it would not be safe to commence the excavations until there were materials enough on hand to last six months, for the sand, which changes its position with every wind that blows, would require to be removed again in order to lay the foundations. No injury can result by my absence, which would not be prolonged beyond the 1st of June, as every preparatory arrangement will be made, or put in forwardness, for commencing the work as soon as it can be, with any prospect or hope of success. I shall remain here until the 1st of April, when, if I do not receive orders to the contrary, I shall proceed to the places before mentioned, and make every arrangement for procuring and forwarding the quantity of stone required.

I have the honor to be, very respectfully, your most obedient servant,

GEO. BLANEY,

Captain Corps of Engineers.

Major General MACOMB,
Chief Engineer.

THOMAS CROWN vs. THE UNITED STATES.

Brief of the United States Solicitor.

The petition sets up a contract to furnish 3,000,000 bricks, at Oak island, near the mouth of Cape Fear river, North Carolina, on the 16th March, 1826.

That by the 1st July, 1826, the petitioner had made about 800,000, as appears by letter of Blaney, dated 9th August, 1836, and of which said B. admitted that 250,000 could have been received.

Blaney having forwarded contract, department objected, and the contract was declared a nullity; but petitioner avers it was not, as the regulations did not then require any bond, &c.; that existing regulations were complied with. After this Blaney refused to carry into effect the contract. That as a pretence for refusing to fulfil the contract, Blaney said the petitioner had not the means to fulfil the contract, and was in debt to one Potter. But petitioner owed P. only \$600, and if B. had paid for the 250,000 bricks, he would have been relieved. That B.'s refusal forced him to assign his property to Potter, and P. thereupon sold the bricks to government at \$8 50 per thousand. That B. declared said contract void, and refused to modify it, although no breach had occurred, and he was not bound to deliver any bricks till the 1st of October, and then only 1,000,000.

Claims \$11,254.

The first objection to the claim is, that the contract under which the claim is made was never ratified by the department.

It is contended that this was unnecessary—that the contract was complete without such ratification; that it does not purport to require such ratification; that the regulation now in force, which expressly requires such ratification, was not in force at that time.

That the contract was made subject to the approval of the department, appears—

1st. By the fact that it was set aside by the Chief Engineer, and declared to be a nullity. (See letter of Captain Smith.) And we have the same evidence of the authority of the Chief Engineer to annul the contract, that we have of the authority of Captain Blaney to make it, viz: the exercise of the power by the parties severally; and the claimant, when he seeks to charge the United States for the acts of its agents, must be held to take notice of the extent and limitations upon the authority of the agents.

The claimant shows here no authority for Blaney to make this contract. He proceeds on the presumption that a public officer is authorized to do what he undertakes to do by virtue of his office, till he is shown to have exceeded his powers. The same thing must be presumed of the Chief Engineer.

2d. It appears by Gen. Totten's letter, that the approval of the Chief Engineer was required at the time this contract was made, by the custom of the department. The regulation referred to by the petitioner, requiring the contract to be transmitted to the Chief Engineer, is not inconsistent with the rule; on the contrary, it was made mani-

festly to enable the Chief Engineer to exercise this control over the contracts.

3d. It is admitted in a memorial presented to Congress by the petitioner, that the bond, for the want of which the contract was annulled by the department, was promised by him. He attempts to excuse himself for not furnishing it, however, by saying, "that it was not required in the advertisement, or demanded before he repaired to Smithville, or considered indispensable by Captain Blaney, else your memorialist would not have been permitted to go on as far as he did in completion of his contract." (See memorial, marked A.)

This statement, that the bond was required as a condition precedent to the validity of the contract—that Captain Blaney did not consider *it indispensable*—may be true also. The department did not certainly; but either the bond was required, or it was required that 20 per cent. should be reserved on the payments to enforce the execution of the contract. The claimant admits that he promised to give the bond. Captain Blaney says Col. Bomford and Maj. Wade were the bondsmen named, but they refused to serve. This put an end to the contract, as this alternative had been chosen, no doubt, because Crown was unable to lie out of the 20 per cent. required by the other alternative; and, as it is not pretended that any bricks were delivered under it, which were not paid for, it is difficult to understand how any liability can be supposed to exist on the part of the government.

As to the case of the *United States vs. Tillotson*, 1 Payne C. C. Reports, it is said in the opinion of the court, p. 322, that it appears in evidence, that "Col. James Gadsden was acting as the agent for the fortifications at Mobile Point, and was thereto [to make the contract] duly authorized by the War Department," &c.

Also at p. 325: "If Col. Gadsden was duly authorized to make the contract itself, as the case expressly admits, &c., no ratification was necessary, and the case furnishes no evidence of any such usage."

Referring to the case quoted, in which there was a ratification, the court say: "Besides, the instructions might have been different," &c.

The case of *Tillotson*, therefore, does not support the proposition of the claimant, that the contract by Blaney was completed without the ratification of the department, because it was shown expressly in that case that Gadsden was fully authorized to make the contract; and there was not only no proof of its being rejected, as in Crown's case, by the department, or that there was a usage in the department to supervise such contracts when made by subordinate officers, but there was proof of its ratification by the department, and the application to the sureties to consent was not inconsistent with this—for their consent or dissent could not have abrogated the new contract with Hawkins.

It is said, however, in the argument of General Jones, that the objection taken to the failure to procure bond, &c., was an *after-thought*—that the contract was in force for four months without a bond, &c.

It appears by the memorial of claimant to Congress, marked D, that the contract was not executed till about 1st July, (probably 8th, as that was the day it was sent to Washington,) and it was disapproved by letter of July 26, received August 5. What was done at Smithville, by Crown, was done with the express understanding that

a satisfactory bond should be given on the return of Maj. Blaney from the north. When he failed to comply, he could not complain that the contract was annulled by the department.

General Jones insists that a failure to perform a parol agreement about the bond could not vitiate a contract under seal. (See his argument, p. 7.) It is only necessary to claim here that a failure to perform a collateral agreement to give bond, was a justification of the department in declining to ratify a contract which it had the discretion to affirm or annul. But it would be easy to show that such a failure would annul a contract. The rule against varying written contracts does not exclude evidence against their validity.

Objections to the admissibility of the testimony.

It is urged, however, that Crown offered to enter into a new contract—that his offers were refused, and that he was otherwise greatly wronged and oppressed by Captain Blaney and Mr. Potter. What proof is there of this? No proof, certainly, which would be admissible in any court of justice to charge any citizen. Will this court admit mere ex-parte affidavits as evidence to charge the United States? Upon the determination of this question will depend, in a great measure, the character which this tribunal will assume. It has already been decided in Todd's case and others, that the jurisdiction conferred was only such as is proper to be exercised by a court of law; and it is apparent from the provisions of the bill on the subject of testimony, that it was intended that its practice and proceedings should be in accordance with the practice and proceedings of courts of law. Under no recognised principle could the affidavits of Hawkins, Henry or Emerson be admitted in evidence. The two first appear to have been prepared for the affiants, and are neither in the handwriting of the magistrate nor of the affiants. Henry's does not appear (see his letter) to have been signed by himself at all, and it appears by McIntire's report that it was unsigned then. The *jurat* is not appended to the affidavit, and, therefore, but little of it may have been written when it was sworn to. Emerson's appears to have been written down by the magistrate, and is, therefore, less objectionable. It is apparent that Henry's was written by Crown himself, and copied, as it speaks of Crown as "I." But neither of them were subjected to cross examination; they were all taken at a distance from the individual whom they impeach, and many years after the transactions to which they relate.

The principle involved in the admission of these affidavits, however, is the only circumstance which gives importance to the question, for in this case the affidavits prove nothing which tends to fix a liability on the United States.

Crown's evidence that Blaney refused to receive the bricks.

The point attempted to be established is, that Blaney refused to receive certain brick under the contract, and that, by reason of such refusal, Crown was compelled to abandon the contract, and lost the profits, &c.

Emerson says, "Captain Blaney would not receive the said brick, alleging some defect in the contract between the said Crown and Blaney, but what it was *I could not learn*." The statement respecting the refusal of Blaney was evidently made on information. No part of it is made as of his own knowledge, and he says expressly that he could *not learn* what the defect was; which implies that he did *learn* the other circumstances he relates.

Hawkins, however, says he heard Blaney say, "that Crown had better sell them (the bricks) to Samuel Potter, as he had means sufficient to buy them; or may be it might be better to take Potter into partnership with him, but he (B.) would not receive them from Crown." But, again, Henry only says, "Capt. Blaney would not receive the bricks Mr. Crown had made." This is not stated as of his own knowledge.

Giving the language of these witnesses, however, its greatest effect, it proves only that Major Blaney refused to receive the bricks; but under what circumstances, we are left to conjecture. It is not pretended that the bricks were *offered at Oak island and refused*; and certainly it was not sufficient, under the contract, to offer them elsewhere. The bricks in question, by the showing of all of these witnesses, were not brought to Oak island by Crown. They were at Smithville *when they were refused*, and it is entirely consistent with the statements of all these witnesses, that Captain Blaney refused to receive the bricks from Crown *at Smithville*, or to pay for them till they were delivered as required by the contract.

None of the witnesses of claimant controvert the fact, that that was the reason why the bricks were refused; and none of them could be convicted of perjury by showing that that was the true and only reason for this refusal.

Charges of corruption made against Captain Blaney.

Insinuations are made in the affidavits of Hawkins and Henry, against the fairness of Blaney, but no fact is stated in support of them. Some imputation it was necessary to cast on Captain Blaney, to give the least color of claim to Crown; and unless he succeeds now in degrading the honored name of a distinguished officer, now deceased, by his own statements, subscribed by obscure men, he can have no hope of success in his claim. Crown not only fails to mention a single circumstance to give color to this imputation on Capt. Blaney, but every circumstance stated by him in these affidavits repels it. He shows, in the first place, that he had undertaken to supply the bricks at about *half the price* of the average offers made by other persons. 2d. That he had hired most of his hands and his yard of Potter, and was in debt to him, and could not raise money to pay him. 3d. That he had met with reverses in his business, and was without capital.

According to his own story, he was unable to carry on his business and fulfil his contract, unless Blaney would *advance him money*; because, although he calls it *receiving and paying for the bricks*, it is manifest that he could not have delivered the bricks without the con-

sent of Potter, who had a lien on them for rent, &c.; and it was therefore necessary either that Potter should *permit* him to deliver the bricks, receive the money, and trust to his honesty to pay him, or that Blaney should receive the bricks at the yard, and pay him, Crown, the money, in the confidence that he would pay Potter, and therefore enable him to get the bricks. On his own showing, it is probable that *Potter* would not trust him. It is most improbable, that a man without capital, under the most favorable circumstances, should have been able to have delivered bricks to the government at about half the price at which sixteen other bidders thought it could be afforded with profit. His embarrassment and difficulties were the legitimate results of his inconsideration. Potter, his creditor; like other creditors, would naturally be on the watch to prevent Crown from making him the sufferer, and would prevent Crown's getting into his hands the price of bricks which had been made at his yard, by his hands, and with his wood.

Blaney could not advance the money, as Crown had given no bond, and the law forbade it; nor would any prudent man have advanced his own money under such circumstances.

Considered, then, on Crown's own showing, it is manifest that it is a case of an attempt to make the government pay Crown for losses, if any, which were the results of his own want of judgment; and those who undertake such schemes will not scruple to make any charge against public officers who stand in their way, which may be required by the exigencies they are under.

It is not necessary to consider the statements of Blaney, Holmes and Potter, to see that Crown's imputations and claim are unfounded; but they render it unnecessary to examine the statements of the claimant so critically. Thus, these statements show, affirmatively and positively, what were the circumstances under which Blaney refused to receive the bricks; whereas, it is only inferentially that it appears from Crown's statements, that he refused to receive them *at the yard*.

The reasons also why Crown could not deliver (which the circumstances he details plainly suggest) appear expressly in these statements; and the statement of Mr. McIntire's Report, of 1830, that all the facts stated are consistent, will be found entirely true.

Every fact stated is consistent with the account Blaney gives of the transaction in his sworn statement. Nor is there the slightest reason for supposing that he, or even Potter, had any motive to oust Crown, if Crown had proved himself able to carry on the business successfully—because Potter was renting him his brick-yard, hiring him hands, and selling wood, &c. It was only after his repeated failures that Potter found it necessary to interpose, to save himself from further loss.

Number of bricks made by Crown.

That the first kiln had yielded but 5,000 merchantable bricks, appears as well from Crown's statements as from Potter's, and other facts in the case. That the second burning was also, to a great extent, a failure, appears not only from the statements of Blaney, Holmes and Potter, but it appears from the account produced from

the Third Auditor's office, and filed by the claimant. (See Cert. No. 10.) This was filed by him to show that a larger number of bricks than Blaney and Potter asserted to have been produced from Crown's kilns, were obtained and sold by Potter to Blaney; but this statement, when analyzed, sustains the statement of Blaney and Potter fully. Thus it appears, there, that only 244,000 hard bricks were obtained from Crown's three last kilns, because the 264,000 furnished by Potter were not of the size which Crown made; and it appears also from Henry's letter, that those furnished by Potter, in February, which were made by him after Crown surrendered the yard, were likewise smaller, although he got \$8 50 for them. The whole quantity burned, as stated by Emerson, was 400,000. That amount corresponds exactly with Potter's statement, who says there were four kilns; and as the first contained 100,000, it is probable that was the contents of each of them.

It is attempted to confound the small bricks, delivered by Potter, under his contract with Tuttle about the same time, with the bricks delivered from Crown's kilns and with Crown's bricks; but these are distinguishable by the price (\$7 50) from Crown's bricks, which were sold at \$8 50 and by the size. (See Cert. No. 10.)

It is also attempted to include those delivered by Potter in February, 1827, (384,000,) as part of Crown's brick; but this can also be easily repelled.

In the first place, Emerson, Crown himself, in his early memorials, (see McIntire's report) his witness, Henry, in his letter of March, 1827, and Potter, agree in saying there were about 400,000 or 450,000 bricks made by Crown. Blaney says about 500,000.

2. The first 100,000, with the exception of 5,000, was a total loss. The circumstances of the case can leave no doubt on any one's mind of the truth of this. The reception of 5,000 of them proves Blaney's willingness *at that time* to receive bricks of Crown, whatever may be said of his disposition afterwards on that point; and the fact that no more were received can only be explained by the fact that he then had none that were fit; and his proceeding with the business proves also that there was no misunderstanding about the refusal to receive the remainder.

3. There were then but 300,000 or 350,000 made by him afterwards. Blaney and Potter say there were but about 250,000 of them received as hard bricks. The official returns show 244,000 received, corresponding in size, in time, and price.

4. It is probable that was the whole, because, if there had been more, they would probably have been delivered then, and the money received for them.

5. This is confirmed by the testimony of Hepburn, recently taken by claimant, who says he was there in January, 1827, and that Crown's kilns had been stripped since November preceding.

6. The bricks delivered in January and February of that year were no doubt those manufactured by Potter himself, who, it appears from not only Blaney's testimony and his own, but from Henry's, resumed the business on Crown's failure, and got the *same price for smaller bricks*. The circumstance stated by Hepburn, that he was tempora-

rily there in January, and worked Crown's brick, is also probable, seeing they were delivered in the latter part of the month preceding. Against all these facts, what is there to show that Blaney received more than 250,000 hard bricks from Potter which had been manufactured by Crown?

There is no room to doubt that this was the full number of hard bricks obtained from Crown; and when in this connection the extent of his outfit is considered, and that he was without capital—that he had lost more than a third part of his bricks, there can be little doubt that the statement of Potter is true, who appears to have been a man of wealth and a magistrate—two circumstances which argue some position in the world—that the losses were his, not Crown's, and that he furnished the wherewithal, to a great extent, upon which Crown operated at Smithville, and that instead of \$600 being all that Potter gave for the bricks, he gave the labor and material out of which they were made; and that, in fact, they were made at his expense.

There can be no doubt that the particulars of the number of hands, provisions, money, &c., stated precisely by Blaney and Potter, were correct; as, if untrue, it was so easy to have corrected it by positive testimony for the claimant. And this observation applies to all the material points in the statements of these gentlemen.

Crown's failure not attributable to Blaney.

This failure was entirely due to the miscarriage, in a great measure, of his attempts to make bricks, and the want of means to continue his efforts in consequence of these accidents or reverses. He found himself, in consequence, in debt. He was without capital, without credit, and among strangers; and had undertaken to supply bricks at about *half the average price* at which the other bidders supposed they could be made with profit, and would, therefore, probably have failed if he had lost none of the bricks in the burning.

Potter determined to be paymaster for no more of his experiments, and to put an end to his operations. He says Blaney had nothing to do with his coming to this resolution, or with his putting it into effect; and it is manifest, from the facts disclosed by the claimant himself, that it was entirely in Potter's power to effect this, not only without any co-operation from Blaney, but in spite of his wishes, unless he violated the law by advancing money before the bricks were delivered.

There was not only no necessity for Blaney's co-operation to enable Potter to stop Crown, and therefore no reason to suppose it was required or given, but there is no motive shown for such conduct on the part of Blaney. Without proof, of some sort, that Blaney effected some personal object, the charge that he violated his duty as a public officer, and conspired against the claimant, must be considered frivolous.

Character of the testimony.—Blaney's Report of 1826 the only legal testimony.—The conflict charged between it and his affidavit.

If the court should overrule the objections to the admissibility of the affidavits offered in evidence, they are nevertheless proper to be con-

sidered in weighing the testimony ; and I regard them as scarcely less fatal to the claimant's case so considered, than if allowed to rule out the testimony altogether.

I especially regard the facts disclosed—that the affidavit, purporting to be signed by Henry, bears a different signature from the letter given in evidence, purporting to be from the same person, together with the fact that the signature has been affixed to the affidavit since it was filed, as shown by McIntire's report—as very significant, and highly illustrative of the character of the case. The objection to the testimony offered by the claimant, that it is *ex parte*, is equally applicable to the affidavits of Holmes and Blaney, and to the *unsworn statement* of Potter ; and therefore, if the court sustains the objection, it must exclude these papers also. But the report of Potter, of 1826, is not subject to exception. This was decided by the Supreme Court of the United States in the case of *Wilkes vs. Dinsman*, 7 Howard, 89. Captain Wilkes's official report of facts was declared to be admissible testimony, even in a suit against him, in which the reported facts were material to the issue, on the ground that the report was part of the *res gestæ*, and because it was an *official document*. Both principles apply equally to the report of Captain Blaney to his superior, offered here ; and as it is not introduced as evidence on his own behalf in an action against himself, and there is neither anything on the face of the report itself nor in the evidence introduced here, to show that he had the least suspicion that his conduct would ever be called in question, either before the department or Congress, or elsewhere, there is no circumstance to detract from the effect of a statement which is not only competent, but is, from its nature, being the contemporaneous account given by a disinterested actor in a transaction, the most conclusive testimony which could be offered.

The discrepancies alleged between Blaney's letter of 1826 and his affidavit, are—

1. That in 1826 he said there were 800,000 bricks, and in 1830 he said there were 500,000.

Can that be called a discrepancy which purports to be a correction, which is a voluntary correction, that in no wise advances any other point which it might be supposed the witness might desire except the truth?

How is it material to the maintenance of Blaney's position in this matter, that the number should be one or the other? The loss, indeed, is greater if the larger number be supposed the true one ; but that does not affect the proposition advanced in both papers, that Crown had not means to go on with the job. His bad luck, or bad management, by which so much of his labor was lost—whether 200,000 or 550,000 bricks—was, no doubt, a reason why he was compelled to abandon the job. The great loss, not the exact extent of it, was the material thing, and this is correctly stated in both papers.

Besides, it must be remembered, this correction nearly accorded with the statement of Crown and his witnesses (Henry and Emerson) at that time. (See Crown's memorial, as stated in McIntire's report, Henry's letter, and Emerson's affidavit.)

2. That, in 1830, the reasons of Crown's failure was because of his
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want of means, whilst, in 1826, it was because the bond was insisted on. Both are stated in each communication, beginning at the word "finding," &c., p. 4, Doc. 8, and at the words "when Crown came forward," &c., p. 14, rep. 244. The effort was made in argument to show that, by the use of the word "explicit," Doc. 8, the bond had been the only cause there, but the context shows the contrary.

3. In 1826 nothing was said of Crown's sale to Potter, mentioned in 1830. There was no reason for doing so till the committee called for the explanation.

Measure of Damages.

The amount claimed, as already stated, is \$11,254 58, and interest; in petition A, it was \$2,126 25; in D, it was \$3,000; in B, it was \$6,000.

In neither of the affidavits above referred to is there any proof of any amount of damages. All that is said is, that he sold out at a sacrifice. In a deposition recently taken, it was proved that bricks at Alexandria, in the year 1826, were worth \$5 per thousand. In reply to the question, "In a section of the country where wood, clay, and slave labor abounded, at what rate per thousand could 3,000,000 of hard-burnt bricks have been furnished at the period above mentioned?" the witness answered, "My opinion is, that they might be furnished at \$4 per thousand, allowing reasonable distance for the delivery."

This is all the proof there is on part of claimant upon which to estimate the amount of damage he sustained. I need only say that this furnishes no data for an estimate; and none of the committees who have reported in his favor have referred to the evidence as the basis of their estimates; and it may be also observed, that whilst he claimed \$2,000 or \$3,000, his claim was rejected invariably upon the same evidence on which it was allowed by the committees when he doubled the amount. All the facts in the case show, I think, that so far from his suffering damages by being released from his contract, if he had been compelled to perform it he would have lost a very large sum. No one of the seventeen bidders offered to furnish bricks at less than \$8 50; and that was the price which was allowed for all of Crown's, except the five thousand delivered in June, and for those subsequently delivered by Potter. Clements, who went down to Smithvill also, and examined the locality, bid \$14 50. The previous contract made with Potter by Tuttle, for 1,000,000, by express authority of the Chief Engineer, was \$7 50 for bricks of sixty-four cubic inches, equal to \$9 72 per thousand for those of the size of Crown's, which contained eighty-three cubic inches. There were also various purchases made of other parties, as appears by the statement from the Third Auditor, before and after Crown's, none of which were at as low rates as he contracted for, and this fact he insists upon himself in his memorial D. It is, therefore, altogether improbable, aside from the unfavorable consideration applicable to his circumstances, that he could have made anything by the contract.

It is made manifest, otherwise, that his actual loss, if any, was small. It is said in argument that he got \$800 of Leckie, and \$500

of some one else. I have not seen that proof. If that is proved, that is the extent of investment proved, and it is proved that he brought away the \$600 paid him by Potter.

M. BLAIR.

THOMAS CROWN
vs.
THE UNITED STATES. } *Brief for the final trial.*

The contract for the delivery of three millions of bricks, which is the foundation of this claim, as set out in the petition, was perfectly definite in its terms and stipulations, and was binding upon the government. No ratification by the War Department was necessary to make it valid.

United States vs. Tillotson, 1 Paine, 325, 334.

See also Gen. Walter Jones's argument, House Rep., 645, 1st. sess. 29th Congress. This argument leaves little else to be said either upon the law or the facts of the case. The following points will be insisted upon :

1st. It is apparent that Capt. Blaney and Samuel Potter combined together for the purpose of breaking up the claimant's contract, in order that Potter should have the benefit of it. Their own statements are incredible in themselves, and go far to convict them of fraud and oppression.

(a.) They admit that Crown had made from 500,000 to 800,000 bricks, and that at least 250,000 were suitable for the work.

(b.) They tell the incredible story that Crown, voluntarily and of his own free will, gave up his whole establishment, with all his bricks, for the pittance of \$600 paid him by Potter.

(c.) It is evident, from Potter's statement, that Crown could easily have complied with his contract if his bricks had been received. He had every necessary facility for making them, and there was ample time according to the terms of the contract.

(d.) Capt. Blaney could as properly have received these bricks from Crown as from Potter. The pretext for giving Potter \$8 50 for the very bricks which Crown was bound to deliver at \$7 75 is a transparent fraud, stigmatizing the whole transaction.

2d. But all the other witnesses contradict the statements of Blaney and Potter. They prove conclusively that the contract was virtually annulled against the consent of Crown, and that he was forced to sacrifice all his property for the benefit of Potter.

(a.) The witnesses—Emerson, Henry, and Hawkins—prove that Blaney positively refused to receive the bricks from Crown.

(b.) They also prove that the bricks were good, and fit to be received, and that they were subsequently worked into the fort.

(c.) Hepburn, in his late deposition, proves that he saw the kilns in the winter of 1826-'27; that the bricks were all gone, leaving only rubbish, and that there was no other building except the fort at which they could have been used.

(d.) The letter of Peter Hagner, of date 1st March, 1830, page 18,

House Rep. 645, 1st sess., 29th Cong., shows that Blaney received from Potter more than 800,000 bricks during the winter, for most of which he paid \$8 50. These must have been the bricks made by Crown.

3d. The claimant is plainly entitled to damages for the gross and oppressive breach of contract on the part of Capt. Blaney. The true measure of damages is not merely the actual loss on the quantity of bricks made and offered for acceptance, but it is the full value of the contract fairly carried out—that is to say, the claimant is entitled to recover the full amount which he might reasonably have made if he had been permitted to fulfil his agreement.

The testimony of Robt. Brockett, an experienced brickmaker, shows that bricks could have been made and delivered at \$4. The profit on 3,000,000 would have been upwards of \$11,000. This sum, with interest, is claimed.

Masterton *vs.* Mayor of Brooklyn, 7 Hill, 61.

P. W. & B. R. R. Co. *vs.* Story, 13 Howard, 307.

2d Parsons on Contracts, 460, Note (t.)

ROCKWELL & STANTON,

For the Claimant.

THOMAS CROWN
vs.
THE UNITED STATES. } *Rockwell's brief for claimant.*

I. The written contract between Captain Blaney on behalf of the United States and Thomas Crown, of the 16th March, 1826, was duly authorized by and was executed in strict conformity with law, and was binding on the United States. See regulations in force at the time. Sec. —.

1. The proposals in the National Intelligencer.

2. The letter of acceptance.

3. The report of Captain Blaney to the Engineer Department, with certificate that "the contract was made upon the most favorable terms that could be procured."

4. By law and the regulations of the department, there was no other requisition for a complete, valid, and binding contract.

The answer of General Totten, of March 2, 1846, shows that the law and regulation of the department are as claimed by us; but he refers to the letter of Captain Smith, of July 26, 1826, as showing the usage to have been different.

1. That letter says nothing about the usage; the *fact* of Captain S. adding a requisite not required by law or regulation is made evidence, and the *only* evidence of the *authority* to do. It proceeds on the ground that no officer of the government can do any wrong. And that his *single act* is evidence of a *usage*, and that the "action of the department" in this one instance, and "the understanding it had of its own powers over contracts," is conclusive.

2. If there were such usage, it was never publicly known or brought home to the contractor.

3. The letter of General Totten, of 18th March, 1846, does not vary the rule.

1. His first objection, that "it contains no certificate by the officer that the contract was entered into on the most favorable terms that could be procured," is not correct in fact. (See *pet. 3*, certified by General Totten himself.)

2. The second objection as to transfer does not apply. 1. No such restriction in 1836. 2. No claim to transfer.

3. The third objection as to the bond or withholding of a per centage, is only as to the *form* and *provisions* of contracts, and the usage as to inserting such provisions in the contracts themselves. No cases are referred to except "*this very contract*."

4. The fourth statement is very loose—"about the period of 1846." *Nor is it doubted* that in 1826 approval was considered necessary. (See *United States vs. Tillotson*, 1 Paine, 325, 334.)

5. All verbal negotiations or pretended engagements as to trade, &c., are merged in the contract, and cannot be made to vary its terms.

6. If subsequently required by the officer, it was without authority of law—could not affect a contract already made, was wholly without consideration, and in no respect binding on Crown.

7. The grounds of objection to the contract by Captain Smith. (See Captain Smith's bill.)

II. Did Crown do his duty in relation to his contract?

1. By the terms of the contract, no bricks were required to be delivered until 1st October, 1826, and then 1,000,000. Crown made before 1st July 800,000 bricks. If these were good, he had three months in which to make 200,000. If all were rejected, he had time to make the full 1,000,000.

2. Of these bricks, Blaney declares 250,000 would be received.

3. In fact, the bricks were good, and the same bricks were actually purchased and used in the fort at seventy-five cents more per thousand than the contract price. The witnesses say so. (See the testimony.) Blaney says that he agreed to pay \$8 50. Blaney's statement not true—

1. That Crown did not know of action of department—contradicted by two witnesses.

2. That 1,000,000 brick had been purchased of Potter by Lieutenant Tuttle, at \$7 50. (Return of Mr. Hodges shows only 264,689.)

3. Potter delivered about 250,000 bricks, (from 500,000 to 800,000 bricks.)

4. Bricks made out of "loam, clay and sand," and poor, not true. Bricks good, and bought by Blaney at \$8 50 per thousand.

5. The whole amount of "*salmon*" brick was 26,960, at \$4 = \$107 84. If taken at contract price \$7 75 = \$208 94, less amount received, \$107 84 = \$101 10, the whole loss on Crown's brick.

6. See also Blaney's statement, August 9, 1826. (Doc. 8, Ex. Doc. 1st sess., 21st Cong. 1 State Papers.)

III. Did the government fulfil their contract—are they excused from doing so by the act of Crown—was there a *voluntary* abandonment of it on the part of Crown?

IV. Damages.

I. The reports and certificates of General Totten are not admissible in evidence.

1. The general principle as to the admissibility of State papers and copies of papers at public offices and the certificate of public officers.

1. The general rule that all testimony must be under oath. (1 Stark, Ev. 23, c. 242; 1 Phi. Ev. p. 8, 2 ch. 7, 425--435; U. S. E. Puchman, 7, Pet. 85.) "We think that on general principles of law, a copy given by a public officer whose duty it is to keep the originals, ought to be received in evidence." (1 Gen. Ev., sec. 479, et seq. p. 456--562; *Buckley vs. United States*, 4 Har. 251.) See book.

2. The law and judicial decisions in relation to the subject in the United States. (Act March 3, 1797, 2d sess. 4th Cong., ch. 20, 1 Stat. 512; act March 3, 1817, 2d sess. 14th Cong., ch. 45, 3 Stat. 366.)

United States vs. Buford, 3 Pet. 12, Pu. Cur., p. 29. "An account stated at the Treasury Department which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department when the transactions are shown by its books. In these cases the officers may even certify, for they must have official knowledge of the fact stated."

"But when moneys come into the hands of an individual, as in the case under consideration, the books of the treasury do not exhibit the facts, nor can they be officially known to the officers of the department. In this case, therefore, the claim must be established, not by the treasury statement, but by the evidence on which that statement was made." (*United States vs. Jones*, 8 Pet. 375; see case. *United States vs. Jones*, 8 Pet. 387; see case.)

Cox & Dick vs. the United States, 6 Pet., 172, Pu. Cur., p. 202. "In the case of *The United States vs. Buford*, 3 Peters, 29, it was held by this court that an account stated at the Treasury Department, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the act of Congress. Such statements at the treasury can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department when the transactions are shown by its books."

Smith vs. The United States, 5 Pet., 292, Pu. Cur., p. 300. "When copies are made evidence by statute, the mode of authentication required must be strictly pursued. The legislature may establish new rules of evidence in derogation of the common law, but the judicial power is limited to the rule laid down."

"There are two kinds of transcripts which the statute authorizes the proper officer to certify: First, a transcript from the 'books and proceedings of the treasury;' and, secondly, 'copies of bonds, contracts, and other papers, which remain on file and relate to the settlement,' &c. (See the case.)

United States vs. Patterson Gilpin, Dis. C. R., 47. "A certified statement of a balance due and the report thereof to the Comptroller, is not such a transcript from the books and proceedings of the treasury

as may be given in evidence under the 2d section of the act of March 3, 1797."

Blucker vs. Bond, 3 Wash., C. C. R., 529. "The certificate of the Register of the Treasury Department, under his hand, that certain receipts, of which copies are annexed, are on file in his office, with a certificate of the Register of the Treasury, under the seal of the department, that he is Register, is not evidence. It must appear not only that the officer who gives the certificate has the custody of the papers, but that he is authorized by law to certify them, and the Register is not so authorized, a sworn copy should have been produced."

United States vs. Edwards, 1 McLean, C. C. R., 41. "A transcript from the treasury which contains sums charged in gross as balances is not evidence as to such balances."

The principles settled by the foregoing decisions are:

1. That by the general and binding principles of law, especially by the common law, in force in the United States, and forming the rules and decision in all courts of law and equity, facts must be proved by the testimony of witnesses under oath.

2. That the official station or dignity of the person in his connexion with any public office forms no exception to the rule.

3. That the statements of public officers in some cases, as in the case of private agents and other persons, are often admissible as *facts*, as *acts done*, as part of the *res gestæ*.

4. These and other general principles of evidence are applicable to transactions in which the government are a party, and in relation to its own officers in the same manner as in cases of individuals, except so far as the same are modified by positive statute.

5. That the acts of Congress of March 3, 1797, and March 3, 1817, only provide for substituting, instead of sworn copies, the *certificates* of certain public officers, of transcripts from the books and proceedings of the treasury, and copies of bonds, contracts, and other papers which remain on file and relate to the settlement of accounts, &c., and add nothing to the force of the documents themselves. And that such papers of any kind, whether *original* or *sworn* copies, or *certified* copies, are to be judged of as to their *admissibility* to what extent and for what purpose their *genuineness*—the *weight* to which they are entitled by the tribunal before which they are presented—without being in the least degree strengthened or affected by the certificate, or report, or opinion of any public officer.

6. That these statutes merely point out a new mode of *authentication*, and as furnishing new rules of evidence in derogation of the common law, are to be strictly construed.

7. That except for the purpose of *authenticating* papers or documents, the *certificate* of a public officer is not evidence in favor of the United States before courts of justice; and the "*statement*," "*report*," or "*certificate*" of any such officer, not under oath, is not admissible in evidence.

Appropriation, March 14, 1826, 1 sess. 19 Cong., chap. 14, 4 Stat., 149: "For the fort at Oak island, North Carolina, thirty thousand dollars."

1 Stark Ev., 242: "The King's sign manual, authorizing the release

of a prisoner, is evidence to prove the legality of his being at large. (Miller's case, Leach, C. C. L., 3 ed. 69.) But, in general, the certificate by the King of a matter of fact, under his sign manual, is not admissible in evidence."

By Trilles, L. C. J., in *Ornichund vs. Barker*, Trilles, 450, 2 Roll, Ab. 686, H. : "Although in our old cases such evidence was admitted, no exception being taken." *Aliguge vs. Clifton*, Hol., 213.

1 Stark Ev., 23 : "The rank or age of the party in no case forms an exception. A peer of the realm cannot give evidence without being sworn, (*Rex vs. Lord Preston*, Salk., 278,) and will incur a contempt of court if he refuses to be sworn." Ibid : "And it has been said that the same rule applies to the sovereign himself." 2 Rol. ab., 686 ; Heb., 213. But in the time of Charles I, the question was not allowed to be agitated. 1 Parl. Hist., 43 ; 3 Wood., 276, Com. Dig. Test. A. 1.

THOMAS CROWN vs. THE UNITED STATES.

Opinion of the court on the facts, delivered by Chief Justice Gilchrist.

This claim has been pending since the year 1826—a period of thirty years. It has been before Congress at fourteen sessions. Before the first session of the 29th Congress six adverse reports were made upon it. At that and subsequent sessions there were four favorable reports made upon it. We have now endeavored to analyze a rather confused mass of testimony, and to divest the case of all matters which are not strictly relevant to the issue involved. The case does not appear, heretofore, to have been examined with the care and patience necessary to ascertain the merits of the various questions presented.

The claimant states the following case :

In the month of January, 1826, Captain Blaney, who was then superintending the fortifications at Oak island, near the mouth of Cape Fear river, issued proposals for the delivery at Oak island of six millions of bricks. The claimant filed his proposals for delivering from one million to six millions of bricks, of the size of 8, 4, and 2½ inches, at the rate of \$7 75 per thousand. On the 16th of March, 1826, his proposals were accepted by Captain Blaney, who, about that time, reported to the Engineer Department a list of the proposals received by him, at the foot of which list he made this entry : "Mr. Crown's proposals are accepted. He makes the bricks within five miles of Oak island." He also made the following certificate :

"I certify that the contract entered into between Thomas Crown and myself for the delivery of three millions of bricks, for the fortifications at Oak island, was made on the most favorable terms that could be procured.

"GEORGE BLANEY,
"Captain Corps of Engineers."

On the 16th of March, 1826, a contract, under seal, was made be-

tween the claimant and Captain Blaney, acting for, and on behalf of, the United States.

The claimant proceeded to Smithville, near Oak island, having made all the preparations necessary to enable him to carry on his contract, and by the first of July, 1826, had made about eight hundred thousand bricks, of which Captain Blaney admitted that two hundred and fifty thousand could be received under the contract. Certain objections were made to this contract by the Engineer Department, which will be hereafter noticed. There was no agreement between the claimant and Blaney, that the contract might be altered, modified, or rescinded by either party, or that its approval by any superior officer was necessary. After receiving the communication from the Engineer Department, Blaney refused to fulfil the contract, or to accept the two hundred and fifty thousand bricks. He alleged that the claimant had not the means to fulfil the contract, and was in debt to one Potter; but he owed Potter only about \$600, and if Blaney had paid him for his bricks, according to the contract, he would have been relieved from his indebtedness. Blaney insisted upon his transferring his property to Potter, and abandoning the contract, which he did, and sold out his brickyard, implements, and bricks to Potter for \$640. Blaney then accepted from Potter the bricks made by the claimant, being about eight hundred thousand, for which he paid him from \$8 to \$8 50 per thousand. Blaney refused to modify the contract, or to make any contract with the claimant, although there had been no breach of the contract, as he was not bound to deliver any bricks until the 1st of October, and then but one million. It is upon this state of facts that he asserts a right to recover damages of the United States.

This contract was executed on the 16th of March, 1826, and was forwarded by Captain Blaney to the Engineer Department. It appears from the letter of Colonel Totten, of March 2, 1846, that since February, 1840, there has been a regulation providing "that no contract will be binding on the United States, or will go into operation, until it has been sanctioned by the Chief Engineer." He also states, that the regulation in force at the time of this contract required that they should be reported, "accompanied by a list of the proposals, and a certificate declaring them to have been made on the most reasonable terms that could be procured, and copies of all contracts so made must be forwarded to the Engineer Department." It thus appears that it was not necessary to the validity of this contract that it should have been sanctioned by the Chief Engineer. A certificate, in proper form, accompanied the list of proposals. Captain Blaney, after stating that Crown's proposals were accepted, certifies that the contract was made on the most favorable terms that could be procured. The regulation, it will be seen, requires that the contract should be "accompanied by a list of the proposals, and a certificate," &c.; and Colonel Totten is mistaken when he says, in his letter of March 18, 1846, that there was no certificate.

He says, also, that a "contract either contains or must be accompanied by some provision guarantying the full and faithful performance by the contractor of all the stipulations in the contract. This is done

either by taking the contractor's bond, with security, or by retaining from the periodical payment a certain per centage of the amount due. This usage seems to have been enforced in 1826."

It does not appear from this that a provision for collateral security need have been inserted in the contract. The "usage" of retaining a per centage of the periodical payment might have been enforced in any case. There is certainly nothing in the letter showing that the contract would be void to all effects if this collateral security were not given, particularly when, according to the "usage," a part of the payment due might be retained.

Colonel Totten also says, that "in every contract there must be inserted an express provision, that no member of Congress shall be admitted to any share or part thereof, or to any benefit to arise therefrom, (see act of April 21, 1808, section 3.) This provision of the law appears not to have been enforced about the time that Mr. Crown's contract was prepared. Its non-observance was perhaps owing to the fact that its existence was at that time unknown."

It would certainly be rather rigid to enforce a law which had fallen into disuse, or which was unknown, for the purpose of avoiding a single contract, while others with the same defect were permitted to remain unimpeached, particularly where, as in the present case, twenty years had been suffered to elapse before the objection was taken. But the omission to contain this provision does not render the contract void. The first section of the act referred to (2 St., 484,) declares a contract with the United States, in which any member of Congress is interested, to be "absolutely void and of no effect." But the third section merely directs that in every such contract there shall be inserted a provision that no member of Congress shall be interested in it. It does not declare the contract to be void if the provision is not inserted, but is merely directory. The public officer who makes a contract which does not contain this provision may subject himself to censure, but the contract would not be void, upon the well understood doctrine of the law on this subject—a doctrine so long established as to need no authorities now in its support.

Four months after the execution of the contract, on the 26th of July, 1826, Captain Smith, of the Engineer Department, wrote to Captain Blaney that the contract was "decidedly objectionable." The first objection stated is, that there is no penalty expressed, and no bond accompanying and referring to it. This has already been sufficiently commented upon.

It is stated, secondly, that "if the whole should not be delivered, the government is bound, nevertheless, to pay the sum to which it would amount if delivered—at least, according to the letter of the contract, that construction might be put upon it." Now, the "letter of the contract," in its fourth provision, is, that Crown "shall be entitled to receive from the United States, through the hands of the said George Blaney, or such other officer of the United States as shall be duly authorized, for the bricks delivered by virtue of this contract, the sum of \$23,250, lawful money of the United States, being at the rate of \$7 75 for each and every thousand bricks." The obvious meaning of this clause is, that Crown shall be paid \$7 75 for every

thousand of bricks that he shall deliver. The payments by the government depend upon the delivery of the bricks, and it is difficult to understand from what part of the contract the Engineer Department got the idea that the government might be bound to pay the whole price, although a part only of the bricks should be delivered. This objection, we think, must be overruled.

A third objection is, that "the aid the government stipulates to furnish in the reception of the bricks is too indefinitely stated." The contract provides that "the United States are to furnish hands to receive the bricks as they shall be tossed or thrown from the vessel by the contractor." Of course they are to furnish hands enough to perform the duty. It is not necessary that the contract should be so minute in its terms as to exclude every possible conclusion. It is enough if the application of common sense will enable us to understand its provisions. It was upon such objections as these that the Engineer Department pronounced the contract "a nullity:" that is, that it was a contract upon which no action could be maintained, and which could not be the foundation of any legal right whatever—a conclusion which, it appears to us, unauthorized by law, or any regulation or "usage" of the department.

The claimant offered in evidence the affidavit of James H. Henry, dated on the 4th of February, 1830. This was an *ex parte* affidavit, taken to be used, and actually used, before the committee of Congress, and the witness is dead. *Ex parte* affidavits have always been used before the committees from necessity, for there was no person to whom to give notice, or, if any one had been notified, no one was bound to attend and cross-examine the witness. The affidavit accompanies the papers sent us by the House.

The affidavits of D. H. Hawkins and Alfred Emerson are in the same condition as that of Henry.

We think the objections that these are *ex parte* affidavits must, under the circumstances, be overruled. The witnesses are dead, and the affidavits are sent to us by the House. They come properly within an exception to the ordinary rule, that evidence is incompetent where the opposing party has had no opportunity to cross-examine the witness. Cases are often pending before Congress for a whole generation. The tattered and discolored papers transmitted to us, and which, thirty years ago, were laid before Congress, are often the sole evidence of the facts on which the weary claimant relies. During the pendency of his claim, his witnesses fade from manhood to old age: they die, and the memory of the facts perishes with them. It would be unjust in the extreme if we should hold that affidavits, under these circumstances, were incompetent to be used as evidence, and we shall therefore give to them that weight to which we think them entitled.

It is objected that as the jurat on the affidavits of Henry and Hawkins is on the back of the affidavit, it may have been written after the jurat. In the absence of all evidence of fraud, we see no weight in this objection, nor in the further objection that Henry's affidavit is not signed by himself. We know of no universal rule of law that an affidavit, properly authenticated, should be signed. It is merely a further mode of proving that it is the affidavit of the person who

purports to have made it. It is the jurat and not the signature which gives it force and causes it to be regarded as evidence.

The affidavit of Hawkins purports to have been sworn to before "Thom. Williamson, Ald'n Bo. of Norfolk." Although we may not judicially know that an alderman of Norfolk has the power to administer an oath, yet we think, in the absence of any evidence to the contrary, that is *prima facie* sufficient.

On the part of the United States, the solicitor has offered the affidavits of Captain Blaney and John H. Holmes, which are *ex parte*, and both the witnesses are dead, and the affidavits are sent us by the House. These we consider as competent to be considered, for the reasons before given.

The solicitor has also introduced a paper dated on the 22d of March, 1830, signed by Samuel Potter, but not sworn to, and which was among the papers sent us by the House. This we do not consider competent evidence. It possesses no quality which would render it admissible in any court of justice. Potter is dead; but to hold that a mere statement, unsupported by the solemnity of an oath, is competent to be read in evidence, would be to violate all the principles of evidence, and would be altogether unsafe.

It appears from the contract that Crown was to furnish one million bricks on or before the first day of October, 1826. He was not bound to deliver them before that time, but he had a right so to do if he chose, and to receive the contract price for them, which was \$7 75 per thousand.

It is in evidence that Crown, being embarrassed for want of funds, sold his interest in the bricks he had made to Samuel Potter. The evidence in relation to this transaction, and to the quantity of bricks made by him, is as follows: James Henry testifies that he worked there in 1826; that there were between eight and ten thousand bricks—two-thirds of which were of the best quality, and were worked into the fortifications at Oak island; that Blaney would not receive the bricks which Crown had made, and Crown could raise no money to continue the work; that after Blaney's refusal, Potter proposed to purchase the bricks of Crown at a very reduced price, perhaps at one-fourth of their value, and threatened, if he would not accept the offer, to attach the bricks to secure himself; that there was considerable difficulty between them, and at last Crown was obliged to sell out his establishment and bricks at a great sacrifice; that the witness worked for Potter during the rest of the season, and the bricks made by Crown were worked into the fortifications at Oak island, and were as good bricks as the witness had seen in any part of the country.

Alfred Emerson states that Crown incurred considerable expense in preparations for making bricks, and made, to the best of his knowledge, about four hundred thousand bricks, ready for delivery at the fort at Oak island; that Captain Blaney would not receive them, alleging some defect in the contract; that Crown, being in want of money, was obliged to sell them, at a great loss, to Potter, who afterwards sold them to Blaney; that Potter and Blaney came to the brick-yard, and Potter told Crown if he would not receive him as a

partner he would call the negroes and put him across the creek ; but Crown resisting, created a great disturbance between them.

D. H. Hawkins testifies, that in August, 1826, he heard Crown propose to Blaney to enter into a new contract with him, or receive his bricks ; that Blaney said the contract had been returned, and had not been met with security, or something to that effect, and that Crown had better sell them to Potter, or take him into partnership, but that he would not receive them from Crown ; that the witness assisted in working the bricks into the fort, and found them as good as, if not better than, any other bricks received in the fort ; that Crown urged Blaney to receive his bricks and enter into a new contract, and told him he was deficient in means to proceed further, and it would be a ruinous thing to him, but Blaney told him his papers had been sent back from Washington, and he would make no more contracts, but would purchase them from whom he pleased.

David Hepburn, in his deposition, taken on the 11th of October, 1855, states that in January, 1827, he was employed at Oak island as a journeyman bricklayer ; that the quality of the bricks used was entirely merchantable, as much so as bricks usually are, and that the brick kilns were in a dilapidated state at that time. In his second deposition, he says that he did not hear nor see of any other brick-making establishment in the neighborhood than that used by Crown, nor was there any other building going on where the bricks made by Crown could have been used ; that the brick-yard looked as if a large quantity of bricks had been made there, and the clamps looked as if they had been stripped, and there were not many bricks left ; that he was informed by Captain Blaney that the bricks were made by Crown, and there were no other bricks used in the fort of the size of the Washington City standard, (of which these were,) except those made by Crown—the other bricks used having been brought there in vessels from a distance, and that the bricks made by Crown were brought there in lighters.

Robert Brockett, of Alexandria, Va., states that he is a bricklayer and brickmaker, and is sixty-two years of age ; that in the fall of 1826 the average price of hard-burned bricks, at Alexandria, was about \$5 per thousand ; that in a section of the country where wood, clay, and slave-labor abounded, three millions of bricks could have been furnished at \$4 per thousand, allowing a reasonable distance for delivery.

Captain Blaney, in his statement of March 23, 1830, says : " Crown became much embarrassed in his circumstances, and applied to me for an advance of \$1,000 to \$1,500, which it was not in my power to comply with, as the law prohibits advances on contracts ; and on the 31st July, or 1st August, 1826, he, without advice or persuasion on my part, came forward and voluntarily relinquished the contract. The letter of Captain Smith, marked B, returning the contract, was written on the 26th July, 1826, and received here on the 1st August, 1826. Crown relinquished the contract on the 1st of August, 1826, and knew nothing of the objection urged against the contract until I informed him thereof four or five days after the relinquishment."

He denies, also, that he refused to receive the bricks which Crown had made.

That Blaney did refuse to receive the bricks of Crown is asserted by James Henry, Alfred Emerson, and D. H. Hawkins, who say that Blaney advised Crown to sell them to Potter or take him into partnership, but that he would not receive them of Crown. Here are three witnesses against one, and the weight of evidence is, that Blaney *did* refuse to receive them.

Captain Blaney states, also, that it was understood that the contract was not to be considered binding until security was given for its performance. But it is well settled that no penal condition or understanding collateral to a sealed contract, can have any effect upon it.

Captain Blaney also says: "The only difficulty in the final settlement of these accounts was the price which I was to allow Potter for the bricks, as there was a risk in Potter's taking the bricks and selling them for the price which Crown was to have received by the contract, viz: \$7 75 per thousand. On a full consultation with the parties, in which Lieutenant Tuttle, of the corps of engineers, then my assistant, participated, it was determined to allow Potter \$8 50 per thousand for all the good brick. This price was fixed upon with the full approbation of Mr. Crown, and with a view to his benefit alone; for it enabled him to pay Potter all he owed him, and to receive a sum of money (the amount not known by me) from Potter."

There is a mystery in all the proceedings of Captain Blaney which it is difficult to fathom. Why was he unwilling to receive the bricks from Crown? Why did he receive the same bricks from Potter? Why did he pay Potter \$8 50 per thousand for the bricks which Crown was ready to deliver to him at \$7 75 per thousand? In what way could his paying to Potter \$8 50 per thousand benefit Crown?

Henry states that Crown had made between 800,000 and 1,000,000 bricks, two-thirds of which were of the best quality, and were worked into the fortifications at Oak island. If we take the quantity to have been 900,000, two-thirds of them would be 600,000. Emerson estimates the quantity to have been 400,000. The statement of Mr. Hagner, the Third Auditor, of the 31st January, 1828, shows that on the 31st July, 1826, Blaney received of Potter 378,000 hard-burned bricks, at \$7 50 per 1,000, amounting to the sum of \$2,835 06, and that on the 27th December he received of Potter—

264,689 bricks, at \$7 50 per 1,000.....	\$1,985 16
And 244,590 bricks, at \$8 50	2,079 01
On the 26th February, 1827, 334,879, at \$8 50 per 1,000	2,846 47
	5,910 64
Add the bricks delivered 31st July, 1826.....	2,835 06
	8,745 60
To this should be added also a small lot delivered 30th December, 1826, 16,000, at \$8 50	136 07
And the whole amount received of Potter is.....	8,881 67

Crown claims pay for 800,000 bricks, amounting only to the sum of \$5,600, after deducting the expense of transportation to Oak island. It is difficult to estimate with precision the quantity of bricks delivered by Potter from Crown's establishment. But it may be safely assumed that the lot of 378,000, delivered on the 31st July, 1826, came from that place.

This lot, at \$7 per 1,000, discounting 75 cents for transportation, amounted to	\$2,646 00
If we split the difference between Henry's and Emerson's estimates, and call the quantity 500,000, it would probably be not far from correct. If, then, we add 122,000, at \$7, to the above quantity, they would amount to	854 00
	3,500 00

This is, as near as we can ascertain, the value of the bricks which Crown had in his yard, and which Blaney received of Potter.

Our opinion is, that Blaney had no right to rescind the contract until the 1st of October, 1826, because that was the earliest time when Crown was bound to deliver the bricks. His belief that Crown was unable to fulfil the contract was no reason for rescinding it before that time. Crown had a right to be paid for such bricks as he should deliver before that time. Blaney never objected at the time that they should be delivered at Oak island. He placed his objections on other grounds altogether. There is no positive proof that he was actuated by any motive which he could not avow, but the circumstances are sufficient to make his conduct appear extremely mysterious. No good reason is given for his refusing to receive the bricks of Crown, and immediately receiving them of Potter at an increased price.

We do not think that Crown has any legal claim for the sheds, kiln-walls, moulds, &c., against the United States. These he sold to Potter; and even if it was done through an oppressive course of conduct by Potter, and even if Blaney was privy to it, we do not see how the United States can be answerable for it. As to the loss of his profits on 2,200,000 bricks, which he estimates at \$4,000, it is in evidence that he was embarrassed, and we cannot say that he would have been able to go on with his contract even if he had been paid for the 500,000 bricks which were ready to be delivered, although he thinks he should have been able.

Our opinion is, that the contract was a valid one. We think, also, that the evidence shows no good reason for rescinding it; that Blaney refused absolutely to receive any bricks of Crown; and that Crown then had on hand 500,000 bricks, for which he should have been paid \$3,500 under his contract; for which sum we report a bill.

tion, your petitioners offered to pay to the collector of the customs the duties imposed by law on the said importations.

Your petitioners further show, that by the act of July 30, 1846, section first, and Schedule G, a duty of 10 per centum ad valorem was imposed upon "ammonia," when imported into the United States, (9 Statutes at Large, 42,) and, as your petitioners are informed, [vid., also, *Geo. D. Phelps & Dodge vs. same*; also, *H. M. Schieffelin et al. vs. Maxwell*, collector, where the same point was decided,] so decided by the United States circuit court, at New York, in the case of *H. M. Schieffelin et al. vs. C. W. Lawrence*, collector. In violation of which act, the collector of the customs at New York demanded and required your petitioners to pay a duty of 20 per centum ad valorem on their aforesaid importations of ammonia, as for duties due unto the United States on the same; and the money so exacted and paid by your petitioners to the collector aforesaid, amounted to seven hundred and thirty-nine $\frac{1}{100}$ dollars; all which your petitioners were by said collector required to pay, and did pay to said collector, in order to obtain possession of their importations aforesaid.

Your petitioners further show, that the duty by law imposed on their importations of ammonia aforesaid was but three hundred and sixty-nine $\frac{1}{100}$ dollars, as will appear by a statement hereunto annexed.

Your petitioners further show, that in March, 1854, your petitioners presented a claim for the excess of duties exacted so as aforesaid to the collector of the customs at New York, and requested him to certify to the same, in order that such excess might be refunded under judicial decisions and treasury instructions; that said collector declined to certify for a part of the amount claimed, and gave as his reason for so doing that the protest was not such as to make the collector liable in a suit to recover the same—referring to the protests on the entries of the ammonia, signed by your petitioners—but granted a certified statement of a part of the excess claimed, amounting to one hundred and seventy-eight dollars, and on or about the 17th day of July, 1854, the Treasury Department refunded the same to your petitioners; all which will more certainly appear by the invoices, entries, and records on file in the office of the collector of the customs at New York: to all which for greater certainty your petitioners refer.

Your petitioners further show, that of the excess of duties exacted of your petitioners so as aforesaid, there remains the sum of one hundred and ninety-one $\frac{1}{100}$ dollars, which your petitioners claim to have refunded unto them. That the said excess was by the said collector illegally exacted, as for duties due to the United States, from your petitioners upon their aforesaid importations of ammonia; that the said excess was paid by your petitioners to the said collector, in order to obtain possession of their said imports, and your petitioners believe the said excess was by the collector aforesaid, in the regular discharge of his official duty, accounted for and paid over to the treasury of the United States.

Your petitioners further show, that no part of the excess of duties now claimed has been refunded to them, and their right to claim and receive the same has not been alienated by assignment or operation of law.

Wherefore, your petitioners, relying upon the justice of their claim, and the constitution of the United States, which provides that private property shall not be taken for public use without just compensation, (1 Statutes at Large, 21,) humbly pray your honorable court to grant such relief by a bill in favor of your petitioners as may be suitable and necessary, in order that the said sum of \$191 60, with interest on the same from the time of payment, may be refunded to your petitioners.

NEW YORK, July 20, 1855.

H. & F. W. MEYER.

CHAS. E. SHERMAN, *Attorney.*

SOUTHERN DISTRICT OF NEW YORK.

STATE OF NEW YORK, }
City of New York. } ss.

Frederick W. Meyer, being sworn, says, he is one of the firm of H. & F. W. Meyer; that he has read the foregoing, and the facts stated in the petition are true to the best of his knowledge and belief.

F. W. MEYER.

Sworn to before me, this 20th day of July, 1855.

JOSEPH W. BRIDGHAM, *U. S. Commissioner*
Southern District of New York, 2d Circuit.

Statement of importations of ammonia entered at the port of New York by H. & F. W. Meyer, and the duties paid on the same, and the excess now claimed.

Date of importations.	Name of vessel.	Where from.	Duty exacted, at 20 per cent.	Excess refunded July 17, 1854.	Excess claimed.
1850.					
May 11	Southampton	London	\$85 00	-----	\$43 00
1852.					
February ... 4	Victoria.....	do.....	143 00	\$71 50	
May 14	Victoria.....	do.....	99 40	49 70	
August 26	Southampton	do.....	43 60	21 80	
September... 30	Patrick Henry	do.....	86 20	-----	43 10
1853.					
March 7	Eclipse	do.....	82 00	-----	41 00
April 20	Erie	do.....	130 00	-----	60 50
June 28	Prince Albert	do.....	70 20	35 00	
Amount exacted			739 40		
Legal duty, at 10 per cent.....			\$369 70	178 90	
Amount now claimed					187 60

E. & O. excepted.
NEW YORK, July 20, 1855.

H. & F. W. MEYER.

HENRY MEYER AND FREDERICK W. MEYER }
vs. } No. 184.
 THE UNITED STATES.

Brief of legal points and authorities, according to rule 20.

The facts of this case are sufficiently set forth in the petition.

By the tariff act of July 30, 1846, section 1, Schedule G, a duty of 10 per cent. was imposed on "ammonia." (9 Stat. at Large, 42.)

This act was in force, and should have governed the collector in assessing the duty.

The collector exacted a duty of 20 per cent., and claimed as authority for his doing so treasury instructions of December 31, 1847.

In behalf of the petitioners, it will be contended, on the case shown in the petition, and also in the evidence, that the collector erred—

In that he exacted a duty of 20 per cent. on ammonia, commonly called carbonate of ammonia, and that ammonia, in this form, was liable to but 10 per cent., and so decided by the United States circuit court of New York, in the cases of *George D. Phelps & Dodge vs. Lawrence*, *H. M. Schieffelin & Fowler vs. Lawrence*, and same *vs. Maxwell*, and by the Treasury Department, in a letter dated March 21, 1854, addressed to Collector Redfield, adopting said decisions as its rule of construction, and authorizing refunding duties on ammonia.

The excess of duty compulsorily and illegally exacted was \$369 60, of which sum there was refunded \$178 by the Secretary of the Treasury. The balance now claimed, \$191 60, was paid into the treasury of the United States.

The money so exacted and paid into the treasury may be recovered before this court, because the said money was obtained without law, and contrary to the act of July 30, 1846, section 1, Schedule G.

It is in evidence in this case that—

"The article ammonia is a gas, as it is known in chemistry, and is never in that shape an article of commerce. When combined with carbonic acid gas it becomes a solid, called carbonate of ammonia, and is so known in commerce. When combined with muriatic gas it produces the form known as muriate of ammonia, and is known in commerce by that name, and also as sal ammoniac. When combined with sulphuric acid it produces the form known as sulphate of ammonia. These are all ponderous solids, making convenient forms for transporting a large bulk of gas in a small space, and preventing its escape."

CHAS. E. SHERMAN,
 JOHN ELY,
Atty's for Petitioners.

STATE OF NEW YORK, }
City and county of New York. } ss.

On the 6th day of February, A. D. 1856, personally came Edward Laraque, the witness within named, and on the 11th day of Febru-

ary, A. D. 1856, personally came James T. Griswold, the witness within named, and on the 14th day of February, A. D. 1856, personally came Henry M. Schieffelin, the witness within named; and after having been severally sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within depositions were written down by the commissioner, and then proposed by him to said witnesses severally; and the answers thereto were written down by the commissioner in the presence of said witnesses severally, who then severally subscribed said depositions in the presence of the commissioner.

The depositions of Edward Laraque, James T. Griswold, and Henry M. Schieffelin, taken at the request of John Ely, esq., counsel for the claimants, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Henry Meyer and Frederick W. Meyer.

The adverse party was notified, did not attend, and did not object.

MALCOLM CAMPBELL,
Commissioner.

Commissioner's fees, \$19 15.

IN THE COURT OF CLAIMS.

HENRY MEYER AND FREDERICK W. MEYER }
vs.
THE UNITED STATES. }

Depositions taken on the part of the claimants before Malcolm Campbell, commissioner, at the city of New York.

FEBRUARY 6, 1856.

Edward Laraque sworn and examined for claimant.

Question. What is your name, age, occupation, and place of residence for the past year?

Answer. My name is Edward Laraque, aged 28. I am clerk and salesman to H. & F. W. Meyer, the claimants. My place of residence for the past year is Brooklyn.

Question. Have you any interest, direct or indirect, in the claim of H. & F. W. Meyer against the United States, and are you in any degree related to the claimants, or either of them?

Answer. I have no interest whatever, and I am not in any degree related to the claimants, or either of them.

1st Interrogatory. Do you know the petitioners, Henry Meyer and Frederick W. Meyer, or either, and which of them? Under what mercantile firm do they do business?

Answer. I do know both; they compose the firm of H. & F. W. Meyer.

2d Int. Do you know whether the petitioners imported ammonia into the port of New York in either of the years 1850, 1852, or 1853? If yea, by what vessel or vessels, and at what time or times?

Answer. They did; by the Southampton, in May, 1850; by the Patrick Henry, in October, 1852; by the Eclipse, in March, 1853; and by the Erie, in April, 1853.

3d Int. Have you in your possession, or before you, the original invoices and entries of ammonia imported by the petitioners in the years 1850, 1852, or 1853? If yea, produce the same, or true copies thereof, and state from each entry before you the name of the vessel; the date of the entry; the dutiable value of the ammonia described in the same, and the amount of duty exacted and paid on said ammonia; to whom the same was paid; how much the amount so paid exceeds a duty of ten per cent., and the date when the same was paid. Annex a true copy of each of said original invoices and entries to your answer hereto, including the protest, if any there be; and state also whether the duty exacted and paid on ammonia, specified in each of said entries, was accounted for in the accounts of the customs and paid over to the treasury of the United States.

Answer. I have such invoices and entries, viz: the original invoice and entry of ammonia imported by the petitioners by the Southampton. The date of the entry is May 11, 1850. The dutiable value of the ammonia described in them I am unable at present to state, or the amount of duty exacted on it, or to whom the same was paid, or how much the amount so paid exceeds a duty of ten per cent. The duty was paid, as appears from the entry, on May 16, 1850. I have the original entry of ammonia imported by the petitioners in September, 1852, by the "Patrick Henry;" and the dutiable value of the ammonia described therein is four hundred and thirty-one dollars, and the amount of duty exacted and paid on said ammonia is eighty-six dollars and twenty cents. The amount so paid exceeds a duty of ten per cent. by twenty-three dollars and ten cents, and the same was paid on October 6, 1852.

I have the original invoice and entry of ammonia imported by the petitioners in March, 1853, by the Eclipse, and the dutiable value of the ammonia described in the same I am unable to state at present, or the amount of duty exacted and paid on the same, or how much the duty so paid exceeds a duty of ten per cent. The duty was paid, as appears by the entry, on March 12, 1853.

I have the original invoice and entry of ammonia imported by the petitioners in April, 1853, by the Erie. The dutiable value of the ammonia described in the same, the amount of duty exacted and paid thereon, and how much such duty so paid exceeds ten per cent., I am unable to state at present. The duty was paid, as appears by the entry, on April 22, 1853.

I have no copies of either of the invoices or entries before mentioned. I am unable to state whether or not the duty exacted and paid on the ammonia, specified in either of said entries, was accounted for in the accounts of the customs, or paid over to the treasury of the United States.

4th Int. What was the form or description of ammonia imported and entered by the petitioners, as described in the invoices and entries before you, and what is the most usual form in which ammonia is imported?

Answer. The form of ammonia described in the invoices and entries is carbonate of ammonia. I cannot state what is the most usual form in which ammonia is imported, but this firm usually import it in the form of carbonate of ammonia.

5th Int. Have there been duties refunded to the petitioners on their importations of ammonia? If yea, in what form was the ammonia imported on which duties were refunded, and why were not the duties refunded on the ammonia described in the entries before you?

Answer. I am unable to answer that question of my own knowledge.

Question. Do you know of any other matter relative to this claim of H. & F. W. Meyer? If you do, state it?

Answer I know of nothing further.

EDWARD LARAQUE.

Subscribed and sworn before me, this 6th day of February, 1856.

MALCOLM CAMPBELL,
Commissioner.

The examination is adjourned to Feb. 11, 1856, at 3 o'clock p. m.

MALCOLM CAMPBELL.
Commissioner.

FEBRUARY 11, 1856.

James T. Griswold sworn and examined for claimants.

Question. What is your name, age, occupation, and place of residence for the past year?

Answer. James T. Griswold, aged 43 years. I am refunding clerk in the collector's office in the custom-house in this city. My place of residence for the past year is Brooklyn.

Question. Have you any interest, direct or indirect, in the claim of H. & F. W. Meyer against the United States, and are you in any degree related to the claimants, or either of them?

Answer. I have no interest whatever. I am not in any degree related to the claimants, or either of them.

The witness being now examined upon the interrogatories proposed to the preceding witness—

To the first interrogatory he says: I do not know either of the claimants; I only know that there is such a firm in this city.

To the second interrogatory he says: I only know from the invoices and entries before me.

To the third interrogatory he says: I have before me the original invoices and entries of ammonia imported by H. & F. W. Meyer in 1850, 1852, and 1853, from London, into the port of New York, by ships Southampton, Patrick Henry, Eclipse, and Erie. I have no copies of either the invoices or entries. These I have are records of the custom-house in this city. I produce them in pursuance of a subpoena addressed to Heman J. Redfield, collector, as his substitute.

The entry by the Southampton is dated May 11, 1850. The dutiable value of the ammonia described in said entry is four hundred and thirty dollars, and the amount of duty paid was eighty-six dollars; and the duty so paid exceeds a duty of ten per cent. by forty-three dollars, and the same was paid on May 16, 1850.

The entry by the Patrick Henry is dated September 30, 1852. The dutiable value of the ammonia described in the same amounts to four hundred and thirty-one dollars, and the duty paid thereon was eighty-six dollars and twenty cents. The duty so paid exceeds a duty of ten per cent. by forty-three dollars and ten cents, which was paid on October 6, 1852.

The entry by the Eclipse is dated March 7, 1853. The dutiable value of the ammonia described in the same amounts to four hundred and ten dollars, and the duty paid thereon was eighty-two dollars. The duty so paid exceeds a duty of ten per cent. by forty-one dollars, which was paid on March 12, 1853.

The entry by the Erie is dated April 20, 1853. The dutiable value of the ammonia described in said entry amounts to six hundred and five dollars. The duty paid thereon was one hundred and twenty-one dollars. The duty so paid exceeds a duty of ten per cent. by sixty dollars and fifty cents, which was paid in April, 1853. The duty exacted on the ammonia described in the entries by the Southampton, Patrick Henry, Eclipse, and Erie, was paid to the collector of the customs in this city, or to the cashier who acted for him. The same was paid without protest. From my position as refunding clerk in the collector's office, and my knowledge of accounts in that office, I am able to state that the duty exacted and paid on the ammonia specified in said entries severally, was accounted for in the accounts of customs in this district, and paid over to the treasury of the United States.

To the fourth interrogatory he says: The ammonia imported and entered by the claimants, as described in the invoices and entries before me, is "carb. ammonia." I cannot state what is the most usual form in which ammonia is imported, but I know that it is frequently imported in this form.

To the fifth interrogatory he says: From my position as refunding clerk, I can state that duties were refunded to the claimants on certain of their importations of ammonia, all of which were paid under protest; and so far as I know why the duties were not refunded on the ammonia described in the entries before is, that it was not paid under protest.

To the sixth interrogatory he says: I have already answered that I have no interest.

To the last interrogatory he says: I know nothing further.

Question. Do you know of any other matter relative to this claim of H. & F. W. Meyer? If you do, state it.

Answer. I know nothing further.

JAMES T. GRISWOLD.

Subscribed and sworn before me, this 11th day of February, A. D. 1856.

MALCOLM CAMPBELL, *Commissioner.*

The examination is adjourned to February 14, 1856, at 3 o'clock p. m.

MALCOLM CAMPBELL,
Commissioner.

FEBRUARY 14, 1856.

Henry M. Schieffelin sworn and examined for claimants.

Question. What is your name, age, occupation, and place of residence for the past year?

Answer. Henry M. Schieffelin, aged 47 years. My occupation is a merchant; my place of residence is New York.

Question. Have you any interest, direct or indirect, in this claim of H. & F. W. Meyer against the United States, and are you in any degree related to the claimants, or either of them?

Answer. I have no interest whatever. I am not in any degree related to the claimants, or either of them.

The witness being now examined upon the interrogatories proposed to the witness Laraque herein-above contained—

To the first interrogatory he says: I know the petitioners, Henry and Frederick W. Meyer; they do business in the city of New York, under the firm-name of H. & F. W. Meyer.

To the second interrogatory he says: I know nothing.

To the third interrogatory he says: I know nothing.

To the fourth interrogatory he says: I have no invoices or entries before me. Ammonia is usually imported in the form of carbonate of ammonia, muriate of ammonia, and sulphate of ammonia. Muriate of ammonia is sometimes called sal ammoniac. It may have been imported in the form of aqua ammonia, but that is generally manufactured in this country. My importations have been chiefly in the form of carbonate of ammonia, and I presume that more of the carbonate is imported than any other form.

To the fifth interrogatory he says: I know nothing.

To the sixth interrogatory he says: I have already answered that I have no interest.

Last interrogatory. Do you know any other matter or thing, or have you heard, or can you say anything touching the matters of the question in this cause, that may tend to the benefit and advantage of the petitioners beyond what you have been interrogated unto? Declare the same fully and at large, as if you had been particularly interrogated thereunto.

Answer. The article ammonia is a gas, as it is known in chemistry, and is never in that shape an article of commerce. When combined with carbonic acid gas it becomes a solid, called carbonate of ammonia, and is so known in commerce. When combined with muriatic acid gas, it produces the form known as muriate of ammonia, and is known in commerce by that name, and also as sal ammoniac. When combined with sulphuric acid, it produces the form known as sulphate

of ammonia. These are all ponderous solids, making convenient forms for transporting a large bulk of gas in a small space, and preventing its escape. I have dealt in ammonia in different forms for twenty-five years, during which time ammonia has been imported more or less in the forms of carbonate of ammonia and muriate of ammonia. I cannot say when the importations became considerable in the sulphate of ammonia, but I think it must have been imported, more or less, prior to 1846.

Question. Do you know of any other matter relative to the claim in question? If you do, state it.

Answer. I know that by the tariff act of 1846 sal ammoniac and ammonia are enumerated as liable to a duty of ten per cent. I know that my firm was charged a higher rate than ten per cent. on carbonate of ammonia, against which we protested, claiming that it was only liable to a duty of ten per cent. The question was tested at law as to the rate of duty on carbonate of ammonia, and we recovered back the excess of duty above ten per cent.

H. M. SCHIEFFELIN.

Subscribed and sworn before me, this 14th day of February, A. D. 1856.

MALCOLM CAMPBELL,
Commissioner.

STATE OF NEW YORK, }
City and county of New York. } ss.

John Ely, being sworn, says, that on the 15th day of January, 1856, he served a notice upon M. Blair, esq., United States solicitor of the Court of Claims, a copy of which is hereunto annexed, by leaving the same, addressed to the said solicitor, with Samuel H. Huntington, clerk of the Court of Claims, at the office of said clerk, at the Capitol, Washington, D. C.

JOHN ELY.

Sworn to before me, this 6th day of February, 1856.

MALCOLM CAMPBELL,
Com'r of Court of Claims.

HENRY MEYER AND } *Claim for duties illegally exacted on ammo-*
FREDERICK W. MEYER. } *nia. Notice under rule XI.*

Please to take notice that I propose to take depositions in the above entitled cause before John E. Develin, commissioner, or some other commissioner of the city of New York, appointed by the justices of the Court of Claims, and to examine, as witnesses, Heman J. Redfield, collector, or such officer of the revenue as he may substitute in his place, Richard F. Vanderveer, and any other person, all of the city

of New York, on the 6th day of February next, at half past three p. m., at the office of the commissioner aforesaid; and that said witnesses will be examined on the interrogatories hereunto annexed.

JOHN ELY, *Att'y for Petitioners.*

M. BLAIR, Esq.,

U. S. Solicitor Court of Claims.

WASHINGTON, January 15, 1856.

Interrogatories to be administered to Heman J. Redfield, collector, or such officer of the revenue as he may substitute in his place, Richard F. Vanderveer, and any other person, all of the city of New York, witnesses to be produced, sworn and examined before John E. Develin, commissioner, or some other commissioner for the city of New York, appointed by the justices of the Court of Claims, in a certain cause now pending in the Court of Claims, on the petition of Henry Meyer and Frederick W. Meyer.

1st Int. Do you know the petitioners, Henry Meyer and Frederick W. Meyer, or either, and which of them? Under what mercantile firm do they do business?

2d Int. Do you know whether the petitioners imported ammonia into the port of New York in either of the years 1850, 1852, or 1853? if yea, by what vessel or vessels, and at what time or times?

3d Int. Have you in your possession, or before you, the original invoices and entries of ammonia imported by the petitioners in the years 1850, 1852, or 1853? if yea, produce the same, or true copies thereof, and state from each entry before you the name of the vessel, the date of the entry, the dutiable value of the ammonia described in the same, and the amount of duty exacted and paid on said ammonia; to whom the same was paid; how much does the amount so paid exceed a duty of 10 per cent; and the date when the same was paid. Annex a true copy of each of said original invoices and entries to your answer hereto, including the protest, if any there be, and state also whether the duty exacted and paid on ammonia specified in each of said entries was accounted for in the accounts of the customs and paid over to the treasury of the United States.

4th Int. What was the form or description of ammonia imported and entered by petitioners, as described in the invoices and entries before you? and what is the most usual form in which ammonia is imported?

4th Int. Have there been duties refunded to the petitioners on their importations of ammonia? If yea, in what form was the ammonia imported on which duties were refunded? and why were not the duties refunded on the ammonia described in the entries before you?

6th Int. Have you any interest in the matters and things inquired of in the preceding interrogatories? if yea, state the precise interest you have in the same.

Lastly. Do you know any matter or thing, or have you heard, or can you say anything touching the matters of the question in this

cause that may tend to the benefit and advantage of the petitioners beyond what you have been interrogated unto? Declare the same fully and at large, as if you had been particularly interrogated thereunto.

JOHN ELY,
Attorney for Petitioners.

No. 184.

HENRY MEYER AND FREDERICK } *Claim for duties illegally exacted on*
W. MEYER. } *ammonia.*

Petitioners' demand, as proved in the answers of Griswold to the 3d interrogatory.

The petitioners ask for judgment for duties collected in excess, all over 10 per cent., viz:

1850, May 11, on imports per "Southampton".....	\$43 00
1852, Sept. 30, on imports per "Patrick Henry".....	43 10
1853, March 7, on imports per "Eclipse".....	41 00
1853, April 20, on imports per "Erie".....	60 50
Amount of excess of duty paid.....	187 60
We ask for interest, at 6 per cent., on the above sums from the time of payment until the 27th May, 1856.....	43 97
For costs of the commissioner, his fees in taking depositions used in the case.....	\$19 15
For printing petition and brief.....	10 00
For counsel fees, drawing petition, interroga- tories, and taking depositions.....	50 00
	79 15
	310 72

The facts on which the petitioners claim to recover are set out in the petition, and established in answer to the interrogatories by the depositions of Edward Laraque and H. M. Schieffelin. The *amount* they claim to recover, which was illegally exacted, is established by the depositions of James T. Griswold, refunding clerk in the custom-house. The *amount* deposited to by the witnesses may or may not vary. Griswold is an expert—his daily duties are to make up, at the custom-house, the arithmetical statements on which the treasury refunds duties paid in excess. He was deputed by the collector for this reason, and he knows better than the other witness how to state the amount. Therefore, I claim the sums deposited to by this witness.

The separate sums above stated are the same deposited to by this witness, and in the aggregate amount to \$187 60.

JOHN ELY,
Attorney for Claimants.

HENRY & FREDERICK W. MEYER vs. THE UNITED STATES.

Opinion of the court delivered by Scarburgh, J.

In the years 1850, 1852, and 1853, the petitioners imported into New York divers quantities of carbonate of ammonia. The collector exacted a duty of twenty per cent. thereon, and the same was paid by the petitioners. In 1850 they imported by the ship Southampton ammonia to the value of \$430, and paid for duties thereon \$86: the payment was made on the 16th day of May, A. D. 1850. In 1852 they imported by the ship Patrick Henry ammonia to the value of \$431, and paid for duties thereon \$86 20: the payment was made on the 6th day of October, A. D. 1852. In 1853 they imported by the ship Eclipse ammonia to the value of \$410, and paid for duties thereon \$82; and by the ship Erie, ammonia to the value of \$605, and paid for duties thereon \$121: the first payment of that year was made on the 12th day of March, A. D. 1853, and the second in April, A. D. 1853; the entry bears date the 20th day of April A. D. 1853.

Under the tariff act of 1846, a duty of ten *per cent ad valorem* is levied on ammonia and sal ammonia. It appears from the evidence in this case, that "the article ammonia is a gas, as it is known in chemistry, and is never in that shape an article of commerce. When combined with carbonic acid gas, it becomes a solid, called carbonate of ammonia, and is so known in commerce. When combined with muriatic acid gas, it produces the form known as muriate of ammonia, and is known in commerce by that name, and also as sal ammoniac. When combined with sulphuric acid, it produces the form known as sulphate of ammonia. These are all ponderous solids, making convenient forms for transporting a large bulk of gas in a small space, and preventing its escape." A duty, therefore, of ten *per centum ad valorem*, instead of twenty *per centum ad valorem*, ought to have been levied on the carbonate of ammonia imported by the petitioners. (9 Stat. at Large, pp. 42, 48; Schedule G.)

The duty collected upon the ammonia imported by the	
"Southampton," was.....	\$86 00
The excess (paid on the 16th May, A. D. 1850,) was.....	\$43 00
The duty collected upon the ammonia imported by	
the "Patrick Henry," was.....	86 20
The excess (paid on the 6th October, A. D. 1852,) was.....	43 10
The duty collected upon the ammonia imported by	
the "Eclipse," was	82 00
The excess (paid on the 12th March, A. D. 1853,) was.....	41 00
The duty collected upon the ammonia imported by	
the "Erie," was.....	121 00
The excess (paid on the 20th April, A. D. 1853,) was	60 00
Total excess.....	<u>187 60</u>

We are of the opinion that the petitioner is entitled to relief in this court to the amount of one hundred and eighty-seven dollars and sixty

cents. The reasons for this opinion will be found in the opinions of this court in the cases of *Sturges, Bennet & Co. vs. The United States*, *James Beatty's Executor vs. The United States*, *William W. Spence and Andrew Ried vs. The United States*, and *David Wood vs. The United States*, hereto appended.

We shall therefore report to Congress a bill in favor of petitioners for the sum of one hundred and eight-seven dollars and sixty cents.

STURGES, BENNET & CO. vs. THE UNITED STATES

The opinion of the court was delivered by Judge Scarburgh.

In this case the petitioners allege that, during the years 1847, 1848, 1849, 1850, and 1851, they imported into the United States certain quantities of brandy and other liquors, in casks, and paid duties thereon at the rate of one hundred *per centum*, not only on the value of the quantity of liquor ascertained by gauge to be contained in the casks, but also on the value of the quantity of liquor which had leaked out of the casks on the voyage of importation; and that they claim a return of the moneys exacted from them as import duties on such leakage or non-imported liquors.

The petitioners refer in their petition to a certified statement prepared by the collector of New York, by order of the Secretary of the Treasury, for a particular account of their claim. From this statement it appears that, under instructions of the Secretary of the Treasury, the duties upon their importations were levied according to their invoice value, without reference to deficiencies, unless arising from accident at sea. It was conceded, in the argument submitted in this case, that the leakage arose, not from any accident at sea, but from other causes, and that the deficiency was ascertained from the return of the gaugers.

The act of Congress entitled "An act reducing the duty on imports, and for other purposes," approved July 30, A. D. 1846, imposed a duty of one hundred *per centum ad valorem* on brandy and other spirits distilled from grain, or other materials, imported from foreign countries. According to the principles settled by the cases of *Marriott vs. Brune*, (9 How. R., 619,) *the United States vs. Southmayd*, (Ibid. 637,) and *Lawrence vs. Caswell*, (13 How. R., 488,) this duty is imposed, not upon the quantity of brandy which may have been purchased abroad, but upon the quantity which actually arrives in this country.

In the case of *Marriott vs. Brune*, duties had been imposed upon importations of sugar and molasses made after the act of 1846, according to the invoice quantity; but the report of the weighers and gaugers showed a deficiency between that quantity and the quantity actually imported. Mr. Justice Woodbury, who delivered the opinion of the court, said: "The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here. That is, what is *imported*—for nothing is imported till it comes within the limits of a port. (See cases cited in *Harrison vs. Vose*, 9 Howard, 372.) And by express provision in all our revenue laws, duties are imposed only on imports from foreign countries; or the importation from them, or

what is imported, (5 Stat. at Large, 548, 558.) The very act of 1846, under consideration, imposes the duty on what is 'imported from foreign countries.' (P. 68.) The constitution uses like language on this subject. (Art. I, secs. 8, 9.) Indeed, the general definition of customs confirms this view; for, says McCulloch, (vol. I, p. 548,) 'customs are duties charged upon commodities, upon their being imported into or exported from a country.'

"As to imports, they, therefore, can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom-house; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufactures; and we are unable to see any principle of public policy which requires the words of the act of Congress to be extended so as to embrace more.

"When duties are specific on this article, being a certain rate per pound, before the act of 1846, it could of course extend to no larger number of pounds than were actually entered. The change in the law has been merely in the rate and form of the duty, and not in the quantity on which it should be assessed.

"On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad whenever it does not all reach the United States, or we shall in truth assess here what does not exist here. The collection of revenue on an article not existing, and never coming into the country, would be an anomaly, a mere fiction of law, and is not to be countenanced where not expressed in acts of Congress, nor required to enforce just rights."

The same doctrine is directly applied to importations of brandy, in the case of *Lawrence vs. Caswell*.

It is, moreover, held in these cases, that the quantity actually imported is to be ascertained by the gauger's return. In the case of *Lawrence vs. Caswell*, the question whether the duty ought to be computed on the quantity stated in the invoices, or on the contents as ascertained by the gauger's return, was *in terms* considered by the court, and the decision was, that the duty ought to be computed on the latter, and that this question was substantially the same with that decided in the case of *Marriott vs. Brune*. It may be true, as suggested by the solicitor, that there is no mode in which the quantity imported can be ascertained with absolute certainty; but there can be no doubt, we think, that the decision of the Supreme Court, recognising the measurement by gauge as the proper legal method for that purpose, is in conformity both to the acts of Congress and to the usage of the government of the United States for more than half a century.

It is apparent, therefore, that the duties now sought to be reclaimed were paid upon brandies not actually imported, and, consequently, that they were not imposed by law. If, therefore, the petitioners be not entitled to relief, it is not because they have not paid the United States money which the acts of Congress did not require them to pay, but because they paid it under such circumstances as took from them the right to require its repayment.

Prior to the act of March 3, A. D. 1839, an importer might maintain an action for the recovery of an excess of duties, or for the recovery

of duties illegally exacted, against a collector in two classes of cases : (1) where the payment was made for unascertained or estimated duties ; and (2) where it was made under protest. These two classes are distinctly recognised by Daniel, J., in the opinion delivered by him for the majority of the court. In the case of *Carey vs. Curtis*, 3 How. R., 241, he said : "It will be remembered that the two principal cases in which collectors have claimed the right to retain have been those of unascertained duties, and of suits brought, or threatened to be brought, for the recovery of duties paid under protest. It is matter of history that the alleged right to retain on these *two* accounts had led to great abuses and to much loss to the public ; and it is to these *two* subjects, therefore, that the act of Congress particularly addresses itself." Again : "Besides the litigation spoken of, and which is said to lead to this result, is a litigation for duties paid under protest, and not for over-payment of unascertained duties." 3 How. R., 243. Again : "Independently of this statute, the collector might have been sued for over-payments on unascertained duties, as well as for duties paid under protest. And it can hardly be reconciled with reason or consistency that Congress designed to preserve the right of suit in the one case, and to deny it in the other. Yet, if these words have the force contended for by the defendant in error, they give the right of action against the collector for duties paid under protest only, leaving the party who has overpaid unascertained and estimated duties no remedy but that of resorting to the Secretary of the Treasury." *Ibid.*, 244.

The effect of the act of March 3, A. D. 1839, was to take away the right of action against collectors in both these classes of cases. (*Cary vs. Curtis*, 3 How. R., 236.) But by way of compensation to the importer for the loss of his remedy by action, this act made it the duty of the Secretary of the Treasury, whenever it should be shown, to his satisfaction, that in any case of unascertained duties, or duties paid under protest, more money had been paid to the collector, or the person acting as such, than the law required should have been paid, to take the prescribed measures to have it refunded to the person entitled to the over-payment. It may be proper to remark at this point, (1) that this act did not in any way affect, or propose to affect, the *right* of the party making an over-payment in any case therein mentioned to repayment : and (2) that the power which it confers upon the Secretary of the Treasury is purely *administrative*, and in no sense *judicial*. If, therefore, under this act, an importer, in a case either of unascertained duties, or of duties paid under protest, paid to a collector more money than he was by law required to pay, but could not show to the satisfaction of the Secretary of the Treasury that he had done so, he was without any enforceable remedy : but, nevertheless, the action of the Secretary of the Treasury not being *judicial*, but merely *administrative*, the implied contract of the United States to refund to the importer what had been taken or detained from him without authority of law, still remained unsatisfied and undischarged.

Soon after the decision in the case of *Cary vs. Curtis* was made, the act of February 26, A. D. 1845 was passed. What changes in the law were effected by it? First, it restored *sub modo* the right of action against a collector in cases of duties paid under protest ; and, second,

it required the protest to be made in writing, and signed by the claimant, at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof. It is as follows: "That nothing contained in the second section of the act entitled 'An act making appropriations for the civil and diplomatic expenses of government for the year one thousand eight hundred and thirty-nine,' approved on the third day of March, one thousand eight hundred and thirty-nine, shall take away, or be construed to take away, or impair the right of any person or persons who have paid or shall hereafter pay money, as and for duties, under protest, to any collector of the customs, or other person acting as such, in order to obtain goods, wares, or merchandise, imported by him or them, or on his or their account, which duties are not authorized or payable, in part or in whole, by law; to maintain any action at law against such collector, or other person acting as such; to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury touching the same according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."—(5 Stat. at Large, p. 727.)

But that act is silent upon the subject of unascertained duties. It mentions only duties paid under protest. It is wholly inapplicable, therefore, to unascertained duties; and the rights of an importer, in reference to the latter, remained the same *after* as they were *before* the passage of that act.

The only remaining act of Congress at all connected with this subject, is the act of August 8, A. D. 1846. The second section of that act is as follows: "That the Secretary of the Treasury be, and he is hereby, authorized, out of any money in the treasury not otherwise appropriated, to refund to the several persons entitled thereto such sums of money as have been illegally exacted by collectors of the customs, under the sanction of the Treasury Department, for duties on imported merchandise, since the third of March, eighteen hundred and thirty-three: *Provided*, That, before any such refunding, the Secretary shall be satisfied, by decisions of the courts of the United States upon the principles involved, that such duties were illegally exacted: *And provided, also*, That such decisions of the courts shall have been adopted or acquiesced in by the Treasury Department as its rule of construction." (9 Stat. at Large, p. 84.)

That statute has no application to unascertained duties. It, in terms, applies only to duties *illegally exacted*. Now, unascertained duties, in the strictest sense of those terms, certainly as applicable to a case like the one now under consideration, are not illegally exacted. There can be no illegality as respects them, except in the detention of the over-payment after the true amount of duties has been legally ascertained.

When an entry is made, the collector, jointly with the naval officer, or alone where there is none, is required by law to make a gross estimate of the amount of duties on the goods entered; and if the goods be entered for home consumption, and not warehoused, no permit will be granted for landing them until such estimated duties are paid. (1 Stat. at Large, p. 664, section 49; 1 *ibid.*, p. 673, section 62; 9 *ibid.*, p. 53, section 1.) And if it be necessary, in order to ascertain the duties thereon, to weigh, gauge, or measure the goods, they cannot, without the consent of the proper officer, be removed from the place where they are landed, before they have been weighed, gauged, or measured; and if spirits, before the proof or quality and quantity thereof are ascertained and marked thereon, by or under the direction of the proper officer for that purpose. (1 Stat. at Large, p. 665, section 51.) So far, therefore, from unascertained duties being duties illegally exacted, they are always demanded and paid in strict conformity to law. The very terms imply that duties are to some extent imposed and payable in the particular case, but that the true amount is unknown and undetermined at the time of payment. The law, in its requirements upon this subject, looks both to the security of the United States, and to the interests of the importer. The just demands of the United States are secured by the payment of the estimated duties, and the goods are liberated without any unnecessary delay, so that they may at once go into the possession of the importer and enter into his business. But the object, as regards the United States, is to secure their just demands, and nothing more; and the payment is made under an implied contract on the part of the United States that the excess, if any, beyond the amount of duties actually imposed by law, shall be refunded to the importer. There can be no doubt, then, that, in the legal sense, unascertained duties are never illegally exacted, and, consequently, that the second section of the act of August 8, A. D. 1846, does not apply to them.

According to these principles, the case under consideration is in its nature a case of unascertained duties; but it is insisted, on the part of the United States, that at the time when the importations which it embraces were made, the duties thereon, under a regulation of the Treasury Department, were required to be computed on the invoice quantity, and that the duties in question were, therefore, ascertained at the time of their payment. Without pausing to inquire whether the consequence deduced from this regulation would necessarily have followed, it is sufficient to remark that the regulation itself was in conflict with law, and invalid. (*Marriott vs. Brune*; *The United States vs. Southmayd*; *Lawrence vs. Caswell*.) "The Secretary of the Treasury is bound by the law; and although in the exercise of his discretion he may adopt necessary forms and modes of giving effect to the law, yet neither he, nor those who act under him, can dispense with or alter any of its provisions. It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress." *Per Mr. Justice McLean, in Tracy vs. Swartwout*, 10 Peters' R., 95: "Any instructions from the Treasury Department could not change

the law." *Per* Mr. Justice Thompson, in *Elliott vs. Swartwout*, 10 Peters' R., 153: "The various circulars from the Treasury Department which have been referred to, and which have been construed in some cases to permit the deduction of the quantity not really arriving in this country, and in others to forbid it, are entitled to much respect in deciding on the true meaning of the revenue laws. But when contradictory or obscure, they furnish less aid, and are *never* decisive or uncontrollable." *Per* Mr. Justice Woodbury, in *Marriott vs. Brune*, 9 How. R., 634, 635: "The orders as well as the opinions of the head of the Treasury Department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court; but it is the laws which are to govern, rather than their opinions of them, and importers, in cases of doubt, are entitled to have their right settled by the judicial exposition of those laws, rather than by the views of the Department." And though, as between the custom-house officers and the department, the latter must by law control the course of proceeding, (5 Stat. at Large, 566,) yet, as between them and the importer, it is well settled that the legality of all their doings may be revised in the judicial tribunals. (*Tracy et al. vs. Swartwout*, 10 Peters, 95; *United States vs. Lyman*, 1 Mason, C. C., 504; *Opinions of Attorneys General*, 1015.") *Per* Mr. Justice Woodbury, in *Greely vs. Thompson*, 10 How. R., 234: The regulation of the Treasury Department referred to by the solicitor cannot, therefore, have the influence or effect claimed for it in his argument. The duties in question here were in their nature, under the acts of Congress, unascertained at the time of their payment, and no regulation of the Treasury Department could deprive the petitioners of the right vested in them by law so to consider and treat them. The obvious reason is, that no such regulation can change the supreme law of the land.

This, then, being a case of unascertained duties, it was competent for the Secretary of the Treasury, under the act of March 3, A. D. 1839, which for this purpose is still in force, if it had been shown to his satisfaction that more money had been paid to the collector than the law required should have been paid, to have taken the measures prescribed by that act to have it refunded to the petitioners. But this, the petitioners allege, he has refused to do, upon the grounds that no protest was made, and that a portion of the claim was barred by the statute of limitations. The petitioners, therefore, are entitled to relief, unless the action of the Secretary of the Treasury is conclusive against them. We have already stated that the power of the Secretary of the Treasury under that act is purely administrative, and in no sense judicial. This is sufficiently obvious from the very terms of the act. It did not vest the Secretary of the Treasury with the power of deciding upon the rights of the claimant, except to the extent that he might be required to act upon them. It made it a condition precedent to the party's right to the Secretary's warrant upon the treasurer for the over-payment, that he should satisfy the former that his claim belongs to one of the classes mentioned in the act, and was well founded. This mode of redress was thus conditioned and restrained, and for wise and good reasons. It would not have

been either proper or politic to have authorized a payment out of the public treasury to a party whose rights had not been regularly adjudicated and legally ascertained, except upon the very condition imposed by the statute, that he should show to the satisfaction of the head of the Treasury Department that his case was one for which the statute meant to provide. It was not designed that he should obtain relief from a mere ministerial officer, unless his case was shown to be one on which such officer could act with entire safety to the public interests. If he failed to show such a case, then he failed to obtain the benefits of the statutory remedy; but it was not designed that his rights should be otherwise affected. The implied contract of the United States, in a case of unascertained duties, to refund the overpayment, would still continue in full vigor, the decision of the Secretary of the Treasury affecting merely his own official action, and nothing more. And it is no answer to this view that in such a case the party was without remedy, except by an appeal to the legislative department of the government; for if that were sufficient, then there would be but few cases of contract of which this court could take cognizance.

Let an order be made authorizing the taking of testimony in this case.

STURGES, BENNET & CO. vs. THE UNITED STATES.

Scarburgh, J., delivered the opinion of the court.

In the years 1847, 1848, 1849, 1850, and 1851, the petitioners imported large quantities of brandy and whiskey in casks. The quantity entered and appearing on the invoices largely exceeded the quantity ascertained by the return of the gaugers; and under a regulation of the Treasury Department, then existing, duties were levied on the whole invoice quantity, without making any deduction for deficiencies shown by the returns of the gaugers. The several sums of money paid by the petitioners on such deficiencies amounted to the sum of two thousand and sixty-eight dollars.

When this court considered the question, whether testimony should be ordered in this case, it was assumed that on the entries the duties were paid as estimated or ascertained duties. We then held, that the regulations of the Treasury Department, under which duties were levied on the deficiencies shown by the returns of the gaugers, was unlawful, and that the petitioners are entitled to relief against the United States for the amount so levied.

It now appears, from the evidence, that much the larger portion of the brandy and whiskey imported by the petitioners was warehoused, and that the duties on the deficiencies in such importations were paid on the redelivery of the liquors to them from the warehouses. The act of August 6, A. D. 1846, establishing the warehousing system, requires the goods warehoused "to be kept with due and reasonable care, at the charge and risk of the owner, importer, consignee, or agent, and subject at all times to their order, *upon payment of the proper duties* and expenses, to be ascertained on due entry thereof, for

warehousing, and to be secured by a bond of the owner, importer, or consignee, with surety or sureties to the satisfaction of the collector, in double the amount of the said duties, and in such form as the Secretary of the Treasury shall prescribe." (9 Stat. at L., p. 53.) The condition of the bond prescribed by the Secretary of the Treasury, under this act, is as follows: "The condition of this obligation is such, that if the above bounden, (here insert the names of the principal and sureties,) or either of them, or either of their heirs, executors, or administrators, shall, and do, at or before the end of one year, to be computed from the day on which the goods, wares, and merchandise entered for warehousing by or for the above bounden, (insert the name of the principal,) as imported in the _____, _____ master, from _____, as per entry, made at the port of _____, (insert the first port of entry,) and dated the _____ day of _____, in the year aforesaid, shall have been deposited thereat in public store, well and truly pay, or cause to be paid, unto the collector of the customs for the port of _____, for the time being, the sum of _____ ¹⁰⁰ dollars, or the amount of the duties to be ascertained as due and owing on the aforesaid goods, wares, and merchandise, or shall otherwise secure, or cause the amount of said duties to be secured, conformably to law, then this obligation to be void; else to remain in full force and virtue." (1 Mayo's Synopsis, p. 331.)

The regulation of the Treasury Department, which, during the whole period embraced by the importations made by the petitioners, required the collector to exact duties on the invoice quantity of liquors imported, without making any deduction for deficiencies which might appear by the returns of the gaugers, originated in a misconstruction of the tariff act of 1846, and was, therefore, invalid. (*Mariott vs. Brune*, 9 How. R., 619; *United States vs. Southmayd*, *ibid.*, 637; *Lawrence vs. Caswell*, 13 How. R., 488.)

We have heretofore held in this case, that the act of February 26, A. D. 1845, (5 Stat. at L., p. 727,) is not applicable to a case of unascertained duties; and in the case of *James Beatty's Executor vs. The United States*, we held, that the want of a protest does not bar a party's claim against the United States for overpaid duties. See, also, the opinion of this court in the cases of *William W. Spence and Andrew Reid vs. The United States*, and *David Wood vs. The United States*.

The question now presented is not precisely the same as that heretofore considered and decided in this case, or as the questions considered and decided in the cases of *Beatty vs. The United States*, *Spence & Reid vs. the United States*, and *Wood vs. The United States*. We are now for the first time called upon to consider whether a party who, on the redelivery to him of warehoused goods, pays without protest duties not imposed by law, but which are exacted by the collector, is entitled to relief against the United States.

Considering the question now presented under the aspect most unfavorable to the petitioners, it may be thus stated: Can money paid for duties not imposed by law, with a knowledge of all the facts, but under a mutual mistake of the law—both parties having the law in contemplation and in good faith meaning to conform to it, but acting

under a misconception which was ascertained by subsequent decisions of the Supreme Court of the United States—be recovered back? That money thus paid cannot be conscientiously retained, is a proposition which no honest mind can resist. Its retention can be excused only on the ground of positive law. There is no room for the slightest doubt that in this instance the money was paid under the influence of the mistake thus described; and, to our minds, it is obvious that if there be no right of repetition, the law sanctions the doctrine that the property of one man can be acquired by another without the consent or fault of the owner. This cannot be. "It is an universal principle, founded in reason, that no one is entitled to have or retain that which *ex æquo et bono* belongs to another; a principle found in every code, and circumscribed in its application only by positive rules, founded on the convenience and the necessities of mankind." Per Johnson, J., in *Lawrence vs. Beaubien*, 2 Bailey R., 648.

We do not mean to assert the broad proposition that money paid under a mere mistake of the law can be recovered back. On the contrary, there can be no doubt that if it be paid in discharge of a debt contracted during infancy, or of a debt which would otherwise have been barred by the statute of limitations, or where any merely legal defence existed against a claim for the money, *and* it may be honestly retained, no action will lie for its recovery. We entirely concur in the doctrine laid down by Lord Mansfield on this point, "that if a man has actually paid what the law would not have compelled him to pay, but what in equity and good conscience he ought, he cannot recover it back." (*Bize vs. Dickason*, 1 T. R., 286.) It is equally clear, too, that where money is paid on a fair and deliberate compromise of a doubted and doubtful right, both standing on equal terms, and respectively taking their chances of the result, it cannot and ought not to be recovered back.

Nor do we mean to deny that where money is paid under a mere *ignorance* of the law it cannot be recovered back. Whilst we do not very clearly perceive how the maxim *ignorantia juris non excusat* can have any just application to such a case, still we do not find it necessary at present to question its applicability under proper restrictions. There can be no doubt that this maxim "is an indispensable rule of legal and social policy; it is that without which crime could not be punished, right asserted, or wrong redressed," (*Culbreath vs. Culbreath*, 7 Georgia R., 70-1,) and we surely would not weaken its force in its just and proper sense. But the very idea of *excuse* implies that there is something to be excused—that there is delinquency of some kind; and hence the maxim may justly be invoked where crime has been committed, a wrong done, a right withheld, or a duty neglected. But to our minds it is a plain perversion of both the language and the spirit of the maxim to apply it to one who has done no wrong, and withheld no right, and neglected no duty, but is himself the injured party, over whom an advantage in opposition to his legal rights and interest has been acquired; such an application of it offends the moral sense of every man, not only because it is a manifest perversion of language, but because it is palpably unjust. It does not seem to us that there is any motive of public policy which can justify it.

A distinction which, it is insisted, is both clear and practical, has been taken in some of the cases between *ignorance* and *mistake* of the law; and it has been suggested that much of the confusion in the books, and in the minds of professional men, upon this subject, is to be traced to the failure to recognise this distinction. "Ignorance," it is said, "implies passiveness; mistake implies action. *Ignorance* does not pretend to knowledge, but *mistake* assumes to know. *Ignorance* may be the result of laches, which is criminal; *mistake* argues diligence, which is commendable. Mere *ignorance* is no mistake, but a mistake always involves ignorance, but not that alone." And, moreover, "mere ignorance of law is not susceptible of proof. Proof cannot reach the convictions of the mind undeveloped in action; whereas a mistake of the law, developed in overt acts, is capable of proof like other facts." *Culbreath vs. Culbreath*, 7 Georgia R., 70; *Lowndes vs. Chisolm*, 2 McCord Ch. R., 455; *Lawrence vs. Beaubien*, 2 Bailey R., 623; *Hopkins vs. Mazyck*, 1 Hill Ch. R., (S. C.) 242, 251; *Robinson vs. City Council*, 2 Richardson R., 317, 320.

In the case of *Hopkins vs. Mazyck*, 1 Hill, Ch. R., (S. C.) 250, the court, supposing that the observations of the chancellor were calculated to shake the rule in *Lowndes vs. Chisolm*, and *Lawrence vs. Beaubien*, thought it necessary to use the occasion to express their adherence to it. The learned judge who delivered the opinion of the court said: "*Lawrence vs. Beaubien* was decided upon much consideration, and the more I have reflected upon it since, the more I am confirmed in its correctness; and I feel persuaded that all doubts about it proceeded from misapprehension of the principle on which it is founded. There is, as I understand it, a very obvious distinction between ignorance and mistake of law. Ignorance cannot be proved, (who can enter into the heart of man and ascertain how much knowledge dwells there?) and for that reason the courts cannot relieve against it. But not so in regard to a mistake in law. That is sometimes susceptible of proof. In relation to the general rules of property and common honesty, which every one of common understanding must necessarily be taught by their intercourse with society—as, that we have no right to the property of another, and that when, as in this case, one has parted from his property, either voluntarily or for a good or valuable consideration, his dominion and power over it ceases—no one will obtain credit for the pretence of being mistaken. But who that has had any experience in the profession of the law does not know that a whole life of intense application is insufficient to develop all its mysteries, and that the most untiring zeal and ardent pursuit must leave many of the secret recesses unexplored; and shall it be said that those whose pursuits in life are inconsistent with the study of the law shall understand its most subtle and intricate distinctions by intuition, and that at the price of their fortunes? I trust not. Mistakes as to matters of fact have always been regarded as relievable upon clear, full, and irrefragable proof; and mistakes in law ought to be upon the same footing, when the proof is equally certain. Suppose a party claiming the benefit of a contract founded upon a mistake of law should, when put to answer it, admit the fact and be base enough to insist on it, where is the conscience so seared against the claims of justice and common honesty as not to revolt at

it? Is not a mistake of this sort as susceptible of proof as a mistake in a matter of fact? Lawyers are the professional advisers of the community; they are looked up to as oracles in this department; and when, as in *Lawrence vs. Beaubien*, their client is misled by them and makes a contract against his interest, what higher evidence can be wanted of the fact of mistake? Is it not as satisfactory as the admission of the party benefited by the contract? This is only one mode of proof, and I doubt not that there are others which would be satisfactory. But we regard the question as definitely settled, and have only thought it necessary to say this much to vindicate it from the doubts in which the opinion of the chancellor was calculated to involve it." In the later case of *Robinson vs. City Council*, 2 Richardson R., 320, the learned judge who delivered the opinion of the court said: "An actual mistake of the law, made directly in reference to the law itself, is distinguishable from negative inattention. It is the difference between delusion and ignorance." The cases of *Lawrence vs. Beaubien* and *Robinson vs. City Council* may be regarded as illustrations of the distinction between *mistake* and *ignorance* of law. The former was a case of *mistake* of law, and relief was granted; the latter was a case of *ignorance* of law, and relief was denied.

In the case of *Culbreath vs. Culbreath*, 7 Georgia R., 70, the plaintiff, an administrator, made distribution of his intestate's estate among the defendants, to the exclusion of other distributees, with a knowledge of all the facts, but in *mistake* of the law. The object of the suit was to recover the over-payment. The learned judge who delivered the opinion of the court said: "The difference [between *ignorance* and *mistake* of the law] may be well illustrated by the case made in this record. If the plaintiff (the administrator) had refused to pay the distributive share in the estate which he represented to the children of his intestate's deceased sister, upon the ground that they were not entitled in law, that would have been a case of *ignorance*, and he would not be heard for a moment upon a plea that, being ignorant of the law, he is not liable to pay interest upon their money in his hands. But the case is, that he was not only ignorant of their right in law, but believed that the defendants were entitled to their exclusion, and acted upon that belief by paying the money to them. The *ignorance*, in this case, of their right, and the belief in the right of the defendants, and action on that belief, constitute the *mistake*."

The doctrine, therefore, that there is a clear and practical distinction between *ignorance* and *mistake* of the law, not only seems to be founded in reason and justice, but is sustained by authority eminently entitled to respect. Assuming this distinction to be sound and correct, the declaration that where money is paid with a knowledge of the facts, but in *ignorance* of the law, it is a *gift* to the person who receives it, becomes not only intelligible, but consistent alike with truth and justice. The payment having been made, and no other assignable or provable motive for it existing, notwithstanding the maxim *nemo præsimitur donare*, still the conclusion is inevitable that it was a gift. But where money is paid under "an actual mistake of the law, made directly in reference to the law itself," 2 Rich-

ardson R., 320, to say that the payment is *voluntary* and a *gift* to the party receiving it, is as untrue as it is unjust. To apply the maxim *volenti non fit injuria* to such a case, is, to our minds, plainly absurd. Such a mistake, as was forcibly said by Butler, J., in *Robinson vs. City Council*, "is distinguishable from negative inattention. It is the difference between delusion and ignorance." The idea that a gratuity was intended in such a case is preposterous. "The mind no more assents to the payment made under a mistake of the law, than if made under a mistake of the facts; the delusion is the same in both cases; in both alike the mind is influenced by false motives." (*Northrop vs. Graves*, 19 Conn. R., 554.)

The supreme court of errors of Connecticut have distinctly asserted, that when money is paid by one under a mistake of his rights and his duty, and which he was under no legal or moral obligations to pay, and which the recipient has no right, in good conscience, to retain, it may be recovered back, whether such mistake be one of fact or of law; and this, they insist, may be done, both upon *Christian morals* and the common law." (*Northrop vs. Graves*, 19 Conn. R., 548). We concur in this doctrine. We believe that it is sustained by the principle of common law and the adjudications most entitled to respect. We do not mean to say that all the cases can be reconciled with each other. It must be conceded that there is, to some extent, a conflict of authority on this subject. We think, however, that most, if not all, of the citations which can be made against granting relief in cases of mistakes of the law, consist either of mere *dicta*, or of language used in cases which did not call for it, but which might have been decided upon other grounds. The cases are few where the principle held in the case of *Northrop vs. Graves* was necessarily involved and rejected by a direct and positive adjudication.

The principle of the case of *Northrop vs. Graves* has been reaffirmed in the case of *Stedwell vs. Anderson*, 21 Conn. R., 139. In the latter case, it was applied to the conveyance of property, and, in thus applying it, the court stated it in this manner: "When property has been conveyed through mistake, by deed, which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee, in good conscience, has no right to retain, a court of chancery will interfere and correct that mistake, whether it arose from a misapprehension of the facts, or of the legal operation of the deed."

The same principle was expressly held in the case of *Culbreath vs. Culbreath*, 7 Georgia R., 64. In that case the court say: "If there is justice in the plaintiff's demand, and injustice or unconscientiousness in the defendant's withholding it, the action lies; or, to use more appropriate language, the law will compel him to pay. Now, when money is paid to another, under a mistake as to the payer's legal obligation to pay, and the payee's legal right to receive it, and there is no consideration, moral, or honorary, or benevolent, between the parties *by the ties of natural justice*, the payer's right to recover it back is perfect, and the payee's obligation to refund it is also perfect—it becomes a *debt*. It is a case fully within the *ex æquo et bono* rule." (*Ibid.*, 68, 69.)

In the case of *Lowndes vs. Chisolm*, 2 McCord Ch. R., 455, the question directly before the court, and the very point on which the case was decided, was, whether relief can be granted in cases of a mistake of the law. The doctrine was considered "well established, that relief is given where the mistake has been clearly one of law;" and it was thought that "the authorities relied on put the matter beyond all doubt, if, indeed, it could be doubted at this day."

In the case of *Lawrence vs. Beaubien*, 2 Bailey R., 623, this doctrine was applied to the relief of a party from the obligations of a contract under seal. It was there held, that a mistake of law is a ground of relief from the obligations of such contract, where one party acquires nothing, and the other neither parts with any right nor suffers any loss, and *ex æquo et bono* ought not be binding; and that it makes no difference that the parties were fully and correctly informed of the facts, and the mistake as to the law was reciprocal. The court considered that there is no difference in principle between an action to recover back money paid, and one to enforce a contract founded upon a mistake of law; for, in general, the same principle which furnishes a protection from loss supplies, also, the remedy for a wrong. (Ibid, 650.) It will be recollected that, in the case of *Hopkins vs. Mazyck*, 1 Hill Ch. R., 242, the court supposing that the observations of the chancellor might shake the rule in the cases of *Lowndes vs. Chisolm* and *Lawrence vs. Beaubien*, made use of the occasion to express their adherence to it.

The same doctrine seems to be well established in Kentucky. *Fitzgerald vs. Peck*, 4 Litt. R., 125; *Underwood vs. Brockman*, 4 Dana R., 309. In the latter case it was held, that if a man, without any other motive or consideration than an erroneous opinion respecting his legal rights and obligations, release a right, pay money, or undertake to do any act, he is entitled to relief equally as if he had acted under a mistake of fact, and for the same reason, namely, that the contract was not such as the parties, or one of them at least, really contemplated; "and such" the court say, "we understand to be the rational and consistent doctrine of the common law established in Kentucky."

In the case of *Moses vs. Macferlan*, 2 Burr R., 1002, Lord Mansfield states the general principles of the action of *indebitatus assumpsit* for money had and received. "This kind of equitable action," he said, "to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex æquo et bono*, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law, as in payment of a debt barred by the statute of limitations or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play, because, in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition, (express or implied,) or extortion, or oppression,

or an *undue advantage* taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund* the money." Here Lord Mansfield broadly lays down the doctrine, that the action lies for money paid by *mistake*, without making any distinction between a mistake of *law* and a mistake of *fact*—"a suggestion," it has been said by a learned court, (*Northrop vs. Graves*, 19 Conn. R., 556,) "of a much more recent date."

Chief Justice De Grey recognised the same principle in the case of *Farmer vs. Arundel*, 2 Wm. Black. R., 825. He said: "When money is paid by one man to another on a mistake either of fact or of law, or by deceit, this action will certainly lie. But the proposition is not universal, that whenever a man pays money which he is not bound to pay, he may, by this action, recover it back. Money due in point of honor or conscience, though a man is not compellable to pay it, yet, if paid, shall not be recovered back." Without deciding whether the money in that case could have been demanded by the defendant, the court considered it an honest debt, and relief was denied.

In the case of *Bize vs. Dickason*, 1 T. R., 287, Lord Mansfield lays down the same doctrine. "But where," he said, "money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back in this kind of action." It was upon this ground, and this alone, that judgment was given for the plaintiff; and although Mr. Justice Gibbs, in *Brisbane vs. Dacres*, 5 Taunt. R., 144, said: "I cannot think Lord Mansfield said 'mistake of law,'" yet no mistake of fact existed, and the only mistake in the case was a mistake of law. Lord Mansfield, therefore, must be regarded as referring only to a mistake of law; and the case of *Bize vs. Dickason* is direct authority for the principle, that where money is paid under a mistake of law, which there was no ground to claim in conscience, it may be recovered back. The point was necessarily involved in that case, and expressly decided by the court.

The case of *Belvie vs. Lumley*, 2 East. R., 469, is usually cited as a leading authority for the doctrine, that where money is paid with a knowledge of the facts, but under a mistake of the law, it cannot be recovered back. The authority of this case is questioned in the cases of *Culbreath vs. Culbreath*, *Lawrence vs. Beaubien*, and *Northrop vs. Graves*. The report of it is certainly very unsatisfactory. The case was not argued, and it was disposed of in a manner which shows that it was entitled to but little respect as authority. The language of Lord Ellenborough is so loose and indefinite that it is impossible to determine upon what principle he meant to base the decision.

The case of *Brisbane vs. Dacres*, 5 Taunt. R., 144, is also often cited as authority for this doctrine. Taking the principle of that case to be as it is stated by the reporter, it is not at all inconsistent with the decision in the case of *Northrop vs. Graves*. The reporter thus states it: "If a person with knowledge of the fact, but under a mistake as to the law, pays over to another, claiming it as a right, money

which he was not compellable to pay, he cannot, upon discovering what his legal right was, recover it back, *there being nothing against conscience in the other party's retaining it.*" It may well be insisted that no stronger principle is fairly deducible from the decision in that case. Mr. Justice Gibbs, who went further than either of his brethren against granting relief on the ground of a mistake of the law, said: "Lord Mansfield's *dictum* is, that money paid by mistake, which could not be claimed in conscience, might be recovered back. I have, however, considerable difficulty in saying that there was anything unconscientious in Admiral Dacres in requiring this money to be paid to him, or receiving it when it was paid." Chambre, J., was of the opinion that the plaintiff ought to recover, and sustained his views by an able and elaborate argument. He said: "The plaintiff had a right to it, and the defendant in conscience ought not to retain it. The rule is, that when he cannot in conscience retain it he must refund it, if there is nothing 'illegal' in the transaction; the case is different where there is an illegality." Heath, J., said: "It is very difficult to say that there is any evidence of ignorance of the law here." He put his decision on the ground of a voluntary acquiescence in the demand on the part of the plaintiff. Mansfield, C. J., said: "If it was against his conscience to retain this money, according to the doctrine of Lord Kenyon, an action might be maintained to recover it back; but I do not see how the retaining of this is against his conscience. * * * This, then, being so, the admiral doing no more than all admirals do, is it against his conscience for him to retain it? I find nothing contrary to *æquum et bonum*, to bring it within the case of *Moses vs. Macfarlane*, in his retaining it. So far from its being contrary to *æquum et bonum*, I think it would be most contrary to *æquum et bonum* if he were obliged to repay it back." It was upon this ground that he denied the plaintiff's right to recover. It is apparent, therefore, that the decision in this case is not at all in conflict with that in the case of *Northrop vs. Graves*.

In the case of *Hunt vs. Rousmanier*, 8 Wheaton R., 215, Marshall, C. J., said: "Although we do not find the naked principle, that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity." Again: "In this case the fact of mistake is placed beyond any controversy. It is averred in the bill, and admitted by the demurrer, that the powers of attorney were given by the said Rousmanier, and received by the said Hunt, under the belief that they were, and with the intention that they should create, a specific lien and security on the said vessels.

"We find no case which we think precisely in point, and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief."

This case came again before the Supreme Court of the United States, and the decision then made was entirely consistent with the doctrine in the cases of *Northrop vs. Graves*, and *Steadwell vs. Anderson*. The court say: "If all other difficulties were out of the way, the

equity of the general creditors to be paid their debts equally with the plaintiff would, we think, be sufficient to induce the court to leave the parties where the law has placed them." 1 Peters' R., 1, 17.

In the case of *Bank of United States vs. Daniel*, 12 Peters' R., 32, 55-6, the court say: "That mere mistakes of law were not remediable is well established, as was declared by this court in *Hunt vs. Rousmanier*, 1 Peters', 15; and we can only repeat what was there said, 'that whatever exceptions there may be made to the rule, they will be found few in number, and to have something peculiar in their character.' and to involve other elements of decision." There were other elements in that case. (1.) The court expressly say: "The equities of the parties being equal, to say the least, it cannot be against conscience for the appellants to retain their judgment; and (2) the claim was barred by the statute of limitations. So far as this case goes, it rather sustains than is inconsistent with the doctrine of the case of *Northrop vs. Graves*.

In the case of *Wheeler vs. Smith*, 9 How. R., 55, a release from an heir-at-law to executors, made under a mistake of law and some undue influence, was set aside, though a large but inadequate consideration was paid. There was no fraudulent intent in the transaction on the part of the executors. "The influences operating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely and with a proper understanding of his rights." The release was the result of a compromise, but the undue influence rendered it unconscientious for the executors to retain the benefit of it, and it was declared invalid.

One of the questions submitted to the supreme court for their decision, in the case of *Elliott vs. Swartwout*, 10 Peters' R., 137, was, whether a collector is personally liable in an action to recover back an excess of duties paid to him as collector, and by him, in the regular or ordinary course of his duty, paid into the treasury of the United States—he, the collector, acting in good faith, and under instructions from the Treasury Department, and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount, given him. To this question the court very properly responded in the negative. But the learned judge who delivered the opinion of the court went further and said: "The case put in the question is one where no suit will lie at all. It is the case of a voluntary payment under a mistake of law, and the money paid over into the treasury; and if any redress is to be had, it must be by application to the favor of the government, and not on the ground of a legal right." It might be sufficient to say of these remarks that they are mere *dicta*. That they are so is sufficiently obvious. But their propriety depends entirely upon the sense in which the learned judge understood the question which he was considering. It is plain, from his subsequent remarks, that he considered the question as presenting a case analogous to that presented by Mr. Justice Gibbs, in *Brisbane vs. Dacres*, 5 Taunt. R., 144, namely, where one man demands money of another, as matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum of money voluntarily. Such a case presents no question

of mistake either of *law* or of *fact*, and the payment being *voluntary*, and, therefore, a *gift* to the party receiving it, the money might be honestly and conscientiously received and retained.

But not only was the money, in this case, paid for duties not imposed by law, under an actual mistake of the law, made directly with reference to the law itself, in a manner which renders it unconscientious for the United States to retain it, but it was paid under a moral duress, and for that reason cannot be regarded as voluntary. The parties did not stand on an equal footing. The property of the petitioners was in the possession of the collector, and the only means by which they could regain it, was either to pay the duties unlawfully demanded, or to tender the amount actually due and institute an action at law against the collector for its recovery. The horns of a dilemma were presented to them, and they were allowed perfect freedom of will to impale themselves on whichever they pleased. The alternative presented to them was but the choice of two evils, both of which were illegally imposed upon them. To say that a commercial man, the success of whose business depends upon the activity with which it is prosecuted, in submitting to an unlawful demand of duties under such circumstances, makes the payment *voluntarily* and gives the money to the United States, is, it seems to us, a gross perversion of both truth and justice. A payment cannot be a *gift* unless it be *voluntary*, and it cannot be *voluntary* unless it be in such a case. From the time of the leading case of *Astley vs. Reynold*s in the exercise of a *free* will. There is no freedom of volition holds, 2 Strange R., 915, down to that of *Steele vs. Williams*, 20 Eng. Law & Eq. R., 319, the authorities have been uniform and consistent, that such a payment is involuntary, and the money may be recovered back.

In the case of *Astley vs. Reynolds*, the plaintiff pawned his goods with the defendant, and, in order to regain possession of them, paid him usurious interest. He was allowed to recover the excess over the legal interest. "We think, also," said the court, "that this is a payment by compulsion. The plaintiff might have such an immediate want of his goods that an action of trover would not do his business. Where the rule, *volenti non fit injuria*, is applied, it must be where the party had his freedom of exercising his will, which this man had not." 2 Strange R., 916.

The case of ——— *vs. Pigott*, mentioned by Lord Kenyon in *Cartwright vs. Rowley*, 2 Esp. N. P. C., 723, was an action brought to recover back money paid to the steward of a manor for producing at a trial some deeds and court rolls, for which he had charged extravagantly. The objection was taken that the money had been voluntarily paid, and so could not be recovered back again; but it appearing that the party could not do without the deeds, so that the money was paid through necessity and the urgency of the case, it was held to be recoverable. See, also, *Parker vs. Great Western R. Co.*, 7 Mann. & Gr. R., 292.

In the case of *Close vs. Phipps*, 7 Mann. & Gr., 586, the solicitor of a mortgagee, with a power of sale, refused to stop the sale, though the principal and interest of the debt, together with the defendant's

costs, were tendered, unless the mortgager would pay expenses, with which she was not properly chargeable. 'The amount being paid under protest, it was allowed to be recovered back: "The money was obtained by what the law would call *duress*—as the plaintiff was obliged either to pay it or to suffer her estate to be sold, and incur the expense and risk of a bill in equity."

In the case of *Shaw vs. Woodcock*, 7 Barn. & Cress. R., 73, Bayley, J., said: "If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion and may be recovered back." In the same case, Holroyd, J., said: "Upon the question whether a payment be voluntary or not, the law is quite clear. If a party making the payment is obliged to pay, in order to obtain possession of things to which he is entitled, the money so paid is not a voluntary but a compulsory payment, and may be recovered back; and if the plaintiff below, therefore, was compelled to make the payment in question in order to get the policies of insurance, whether there was a pressing necessity or not, he has a right to recover it back."

In the case of *Boston and Sandwich Glass Co. vs. City of Boston*, 4 Metcalfe R., 181, it was held, that payment of taxes to a collector, who has a tax-bill and warrant in the form prescribed by law, is to be regarded as a compulsory payment; and if such taxes were assessed without authority, they may be recovered back in an action for money had and received, although the party made no protest before payment. See, also, *Amesbury Woolen and Cotton Man. Co. vs. Inhabitants of Amesbury*, 17 Mass. R., 461, and *Preston vs. City of Boston*, 12 Pick., 7. The rule arises from the power and authority placed in the hands of a collector of taxes, by virtue of his warrant, to levy directly upon the property or person of every individual whose name is borne on the tax-list in default of payment of the taxes.

In the case of *Oates vs. Hudson*, 6 Wels. H. & G., 346, 348, Parke, B., said: "In *Atlee vs. Backhouse*, 3 M. & W., 633, it is correctly laid down, that in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; but that where a sum of money is paid simply to obtain possession of goods which are wrongfully obtained, that may be recovered back, for it is not a voluntary payment. *Pratt vs. Vizard*, 5 B. & Ad., 808, is an authority to the same effect."

In the case of *Ripley vs. Gelston*, 9 John's R., 201, tonnage money wrongfully demanded by the collector of the plaintiff as a condition of the clearance of his vessel, and paid in order to obtain the clearance, was recovered back of the collector. And so in the case of *Clinton vs. Strong*, *ibid.*, 370, money paid by the plaintiff to a marshal for costs which were illegally demanded, in order to obtain possession of their vessel, was recovered back. The court say: "The payment of the costs could not be considered a voluntary act. They were exacted by the officer, *colore officii*, as a condition of the redelivery of the property. It would lead to the grossest abuse to hold

a payment made under such circumstances a voluntary payment, precluding the party from contesting it afterwards."

In the case of *Steele vs. Williams*, 20 Eng. Law & Eq., 319, the plaintiff applied to the defendant, a parish clerk, for liberty to search the register-book of burials and baptisms. He told the defendant that he did not want certificates, but only to make extracts. The defendant said the charge would be the same whether he made extracts or had certificates. The plaintiff searched through four years and made twenty-five extracts, for which the defendant charged fees, which the plaintiff paid. Held, that the charge for extracts was illegal, and that the payment was not voluntary, so as to preclude the plaintiff from recovering back the money. Barons, Platt, and Martin concurred in the opinion, that when money is paid under an illegal demand, *colore officii*, the payment can never be voluntary.

In the case of *Alston vs. Durant*, 2 Strobhart's R., 257, it was held, that the payment of money exacted by a sheriff, *colore officii*, beyond his legal fees, as a condition of the delivery of the plaintiff's runaway slave, is not a voluntary payment, precluding the plaintiff from contesting it afterwards. The learned judge who delivered the opinion of the court, said: "It will appear hereafter that we attach much consequence to the fact that the party defendant here was a sheriff, and, as it appears to us, should be regarded as acting *colore officii*, and not *virtute officii*, in demanding and receiving a sum of money to which he was not entitled. In my opinion, however, there is both reason and authority for the principle, as applicable to persons in their private individual relations, that if undue advantage be taken by one of another's situation, the first having property of the last in his possession which he illegally retains and refuses to deliver unless a sum of money be paid to him to which he has no legal or conscientious right, this is a fraud, a species of compulsion, and the money ought to be recoverable." (*Ibid.*, 260.) Upon a review of the authorities he came to the following conclusion: "I think, therefore, there is warrant enough, upon authority, to say that where one man, in any capacity, avails himself of the possession of another's goods to wring from that other an unlawful payment of money as the condition, and the only one, upon which the goods will be restored, such payment shall not be voluntary in the eye of the law." (*Ibid.*, p. 264.)

In further commenting on that case, the learned judge said: "For all essential results, here was a public officer acting as a judge in his own case, with power to enforce his judgment, or else to drive the adverse party to a much greater sacrifice, it may be, and thus wresting from the citizen a sum of money which *ex aequo et bono* he could neither receive nor retain. There must be a clear difference between the case of a public officer withholding, of his own mere motion, the rights of a private person, and the demand of one private citizen against another, with no power beyond the ordinary modes of legal proceeding to vest and enforce it, acquiesced in though unlawful." (*Ibid.*, 265.)

Other cases to the same effect might be cited, but these are deemed sufficient to sustain the declaration with which we set out, that from

the time of the leading case of *Astley vs. Reynolds* down to that of *Steele vs. Williams*, the authorities have uniformly and consistently sustained the doctrine, that a payment made under circumstances like those of the present case is compulsory, and the money may be recovered back.

It seems to us, therefore, that the petitioners are entitled to relief.

We shall report to Congress a bill in favor of the petitioners for the sum of two thousand and sixty-eight dollars.

JAMES BEATTY'S EXECUTOR *vs.* THE UNITED STATES.

The opinion of the court was delivered by Judge Scarturgh.

James Beatty, late a merchant of the city of Baltimore, imported from Calcutta, into Baltimore, in January, A. D. 1845, by the barque *Active*, 3,197 bags of saltpetre, usually denominated crude saltpetre, and made due entry of the same for consumption at the collector's office; and in his entry he erroneously, and by mistake, and for want of a knowledge of its character, described 2,197 bags thereof as "partially refined saltpetre," and 1,000 bags as "crude saltpetre," and free from duty, when the entire importation was "crude saltpetre."

The entire importation was reported by the revenue officers as "saltpetre partially refined," and a duty thereon, at the rate of $\frac{1}{4}$ of one cent *per* pound, amounting to \$1,548 52, was exacted of the importer and paid by him. So much of the duty as was exacted on the 1,000 bags—amounting to \$461 11—was paid under protest, and subsequently recovered in an action instituted by the importer against the collector.

The petitioner alleges that the whole importation was "crude saltpetre;" that there is no such thing known in commerce as "partially refined saltpetre;" and that, in the commercial sense, all saltpetre is included under two denominations: "refined saltpetre" and "crude saltpetre."

We are obliged, at the present stage of this case, to assume that these allegations are true. The rule is well settled, that the denomination of articles in tariff laws is to be construed according to the commercial understanding of the terms used; and that, whether the imported article is or is not known in commerce by the words or terms used in the tariff law, is a question of fact, and not of law. *United States vs. 112 Casks of Sugar*, 8 Peters' R., 277; *Elliott vs. Swartwout*, 10 Peters', 151, 153; *United States vs. Breed*, 1 Sumner R., 164; *Two Hundred Chests of Tea*, 9 Wheaton R., 430; *Curtis vs. Martin*, 3 How. R., 106; *Lawrence vs. Allen*, 7 How. R., 785, 796-7.

We also assume, that if there be any case to which the statute law concerning protests is fully applicable, this is such a case. As, therefore, no protest was made *quoad* the subject now claimed, the question is directly presented for the consideration of this court, whether the want of the protest is conclusive against the petitioners.

In order to present an intelligible view of this question, it is proper to consider it (1) as if the acts of Congress of March 3, A. D. 1839, and February 26, A. D. 1845, had not been passed; and then (2) to inquire how far it is affected by those acts.

(1.) First, then, what would be the rights of the petitioner if the acts of 1839 and 1845 had not been passed?

There can be no doubt, taking as we must for the present the allegations of the petitioner to be true, that the money now claimed was paid to the United States by James Beatty, upon the supposition that the saltpetre entered "as partially refined saltpetre" was "partially refined saltpetre;" that in fact it was "crude saltpetre;" that, being "crude saltpetre," it was, under the act of 1842, free from duty; and that the money would not have been paid if the fact that the subject on which the duty was assessed was "crude saltpetre" had been known to the importer. This, then, is a case where money, to which the party receiving it was not entitled, was paid under a mistake of fact, and it would not have been paid if the fact had been known to the party making the payment. In such a case, between man and man, the doctrine is too well settled to admit of doubt or question, that an action would lie to recover back the money, and that it would be unconscientious to retain it.

An impression at one time existed that, in order to recover back money paid under a mistake of fact, the party must show that at the time of payment he not only did not know the fact, but that he had no means of knowing it. This impression was to some extent countenanced in the case of *Bilbie vs. Lumley*, 2 East. R., 469; but it was founded chiefly on the *dictum* of Mr. Justice Bayly in the case of *Milnes vs. Duncan*, 6 Barn. & Cr., 671. It has, however, long since been abandoned. The more just and reasonable doctrine, that the knowledge of facts, which would disentitle a party from recovering, must be a knowledge existing in the mind at the time of payment, is now well established. (*Kelly vs. Solari*, 9 Mee & W., 54; *Bell vs. Gardiner*, 4 Man. & Gr., 11.) Hence, where a party once had full knowledge of a fact, which he had forgotten at the time of making the payment, his forgetfulness of it was such a *mistake* of fact as entitled him to recover back the money. (*Kelly vs. Solari*.) In that case, Parke, B., said: "If money is paid under the impression of the truth of a fact, which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact." It may often happen that the possession of the means of knowledge would afford strong evidence of actual knowledge; but there is no conclusive rule of law that, because a party has the means of knowledge, he has the knowledge itself. (*Bell vs. Gardiner*.) Although, therefore, James Beatty might, by instituting the proper inquiry, have ascertained that there is no such thing known in commerce as "partially refined saltpetre," and that his whole importation was what is denominated in trade "crude saltpetre," yet, if at the time of payment he did not actually know this, he paid the duties thereon under such a mistake of fact as would, if it were a case between man and man, entitle him to recover the money back.

Prior to the act of March 3, A. D. 1839, there were two modes of proceeding in such cases as the present: first, by a suit against the collector; and, second, by petition to the legislative department of the government. If this case had occurred before the passage of the act of 1839, and while the money was still in the hands of the collector, the importer had given him notice of the mistake, and that he meant to hold him personally responsible for the money, or, to use what seems to be the technical language applicable to this subject, had protested against its payment, there can be no doubt that an action therefor might have been maintained against the collector. (*Elliott vs. Swartwout*, 10 Peters' R., 137; *Swartwout vs. Gihon*, 3 How. R., 110.) And there can be as little doubt that, although such notice or protest was essential to the maintenance of the action against the collector, it was in no way necessary to the support of the petition to the legislative department of the government. We speak now of both these modes of proceedings as alike applications for justice; for we hold, that, in such a case as the present, a party was entitled, as a matter of right, to relief as much under the one as under the other. The only difference between them was, not in his right to redress, but that in the action against the collector he had an enforceable remedy, whereas, in his petition to Congress, he has not an enforceable remedy.

The right to recover in the action against the collector was based upon a well-settled doctrine of the law of agency, that where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal. It proceeded upon the assumption that the money sued for belonged to the party paying it, and not to the agent's principal. The object of the notice was merely to warn the collector that the party meant to hold him personally responsible for the money. There was no prescribed form in which it was to be given, nor was it necessary that it should be in writing. (*Ibid.*) The action had its origin in the principles of the common law, and was governed by them. The grounds on which it was maintained are well stated by Mr. Justice Daniel, in the case of *Cary vs. Curtis*, 3 How. R., 250. He said: "We all know that this action for money had and received is founded upon what the law terms an implied promise to pay what in good conscience the defendant is bound to pay to the plaintiff. It being in such a case the duty of the defendant to pay, the law imputes to him a promise to pay. This promise is always charged in the declaration, and must be so charged in order to maintain the action. It was upon this principle that the action for money had and received was sustained in the case of *Elliott vs. Swartwout*. There money had been taken by the collector for duties which were not imposed. This money lawfully belonged to the plaintiff; it was the duty, therefore, of the collector to pay it back to him. The collector was not bound to pay it to the treasurer, for the law did not command this disposition of it. It did not belong to the United States, who had no right, therefore, to demand it of him, and could not have recovered it against him, in a suit, if he had paid it back to the true owner. It being the duty of the collector to return what he had unlawfully taken, the law implied on his part a promise to do so; and on this implied promise, arising or inferred from a duty imposed upon him, the action was maintained. The

protest and notice were to him of no further importance than to warn him to hold over, and to take away an excuse he might otherwise have had from payment to his principal. It was his duty, as the law then stood, not to pay over, but to pay back to the party from whom he had collected without legal authority, when warned that this party should look to him for reimbursement, and not to his principal." These remarks require no comment. They fully sustain the views which we have presented.

If, however, the party had not discovered the mistake, or having discovered it, had not made his protest or given notice to the collector, before the latter had paid the money to the treasurer, no action could have been maintained against the collector. But still the money, which had been collected for duties not imposed by law, and which, therefore, did not belong to the United States, could not have become the property of the United States by the mere payment of it to the treasurer. The position that such a payment would have produced such a result, cannot be sustained upon any principle of law, or of reason, or of justice, or of Christian morals. How could right have been done between the injured importer and the United States otherwise than by a repayment of the money—the money of the importer which, by mistake, had fallen into the public treasury? In such a case existing between man and man, there is no room for doubt as to the right of recovery; and where it occurred between the government and an individual, the obligation of the government to repay the money rested upon the same principle. There was not, and in the nature of things there could not have been, one measure of justice between man and man, and another between the United States and an importer. The same rule of right and justice governed both cases. As against the United States, although there was no remedy in the ordinary courts of justice, yet an application could have been made by petition to the legislative department of the government—not for a favor, but for justice; not for mere gratuity, but for a legal right. To retain money thus falling into the public treasury was as unconscientious in the United States as it would have been in an individual who had received money under similar circumstances; and the legal duty or liability to repay it was the same in both.

Such was the law prior to the act of March 3, A. D. 1839.

(2.) We come now to inquire how far the question, whether the want of a protest is conclusive against the petitioner, is affected by the acts of 1839 and 1845?

The act of 1839 took away the right of action against the collector, (*Cary vs. Curtis*, 3 How. R., 236,) but it did not take away, or in any manner affect or impair, the right of petition to the legislative department of the government; nor is there one syllable in that act which favors the idea that, in order to constitute a legal demand against the United States for the repayment of money paid for duties not imposed by law, a protest is necessary.

The act of February 26, A. D. 1845, is as follows: "That nothing contained in the second section of the act" of March 3, A. D. 1839, "shall take away, or be construed to take away, or impair the right of any person or persons who have paid or shall hereafter pay money,

as and for duties, under protest, to any collector of the customs, or other person acting as such, in order to obtain goods, wares, or merchandise, imported by him or them, or on his or their account, which duties are not authorized or payable, in part or in whole, by law, to maintain any action at law against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury touching the same, according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." (5 Stat. at Large, 727.)

Prior to the act of 1839, as we have seen, an action might have been maintained against a collector, provided there was a protest or notice. In that action the importer had the right to have "the legality and validity of" the "demand and payment of duties" ascertained and tried, and "to a trial by jury touching the same, according to the due course of law." This is undeniable. The only object of the notice was to warn the collector not to pay over, and that he would be held personally responsible for the money. The question of "the legality and validity" of the demand and payment of the duties did not depend upon the notice or protest, but altogether upon other grounds. It is true that the failure to make any objection to the payment, or, in other words, to make a protest, might have afforded evidence that the payment was *voluntary*; but, according to the principles of the common law which governed the action, the failure to protest could have had no other legal effect or operation upon the question of "the legality and validity" of the "demand and payment" of the duties. It would have had no effect whatever upon that question in a case where the payment was made under a mistake of fact; because such a payment was never regarded as *voluntary*, in the technical sense of that term. It is obvious, therefore, as we have already shown, that the protest was not *essential* to the validity of the demand against the United States, and was in no respect necessary to support the petition to the legislative department of the government for a repayment of the money. The want of a protest could be used on the hearing of such petition for no other purpose than that for which it could be used upon the question of the legality and validity of the demand of the duties in the action against the collector, namely, as evidence that the payment was *voluntary*. We do not mean to be understood as embracing in these remarks the question, whether the failure to make objection to the payment of duties could in any case operate by way of an *estoppel in pais*. That question, whenever it shall arise, must depend upon its own principles, and cannot affect the correctness of the views which we have presented.

The question now to be considered is, did the act of 1845 produce any change in these respects? That act was, to some extent, a declaratory statute. The Supreme Court, in the case of *Cary vs. Curtis*,

had held that the act of 1839 took away the right of action against the collector; and the act of 1845, in substance, declares that it was not the intention of Congress that the act of 1839 should have that effect. Its terms have already been quoted. As regards the action against the collector, the only essential change which the act of 1845 seems to have made, is to require that the protest shall be "in writing, and signed by the claimant, at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." There is nothing in that act which either expressly or by implication shows an intention to do more. The words used are plain, and we cannot intend that the legislature meant anything more than it has expressed. We do not sit here to enact laws; that important power is intrusted exclusively to the legislative department of the government. It is our business to declare what the law is in the particular case which we are called upon to decide. In the construction of a statute, when words of a plain and definite import have been used, we are not at liberty to disregard them. Where such words are used, the only safe course is to adhere to the words, and to *collect* the intention of the legislature from them. It has been the experience of the most enlightened judges, that it is dangerous to depart from the plain and obvious meaning of the words of a statute. We are not at liberty to *presume* the intentions of the legislature, but we must *collect* them from the words of the statute; and we have nothing to do with the policy of the law. "This is the true sense," says Mr. Dwaris, "in which it is so often impressively repeated, that judges are not to be encouraged to direct their conduct 'by the crooked cord of discretion, but by the golden metwand of the law;' i. e., not to construe statutes by equity, but to collect the sense of the legislature by a sound interpretation of its language, according to reason and grammatical correctness." (1 Dwaris on Statutes, p. 702, 703.) We are constrained, therefore, to say, that there is nothing in the act of 1845 which indicates an intention to give to the action against a collector a different legal effect from that which it had prior to the act of 1839. The failure to make a protest is no more conclusive against an importer now than it was before the passage of the act of 1845.

But it is supposed that some remarks made by Mr. Chief Justice Taney, in the case of *Lawrence vs. Caswell*, (13 How. R., 496,) militate against these views. Those remarks are as follows: "But it is proper to say, in order that the opinion of the court may not be misunderstood, that when we speak of duties illegally exacted, the court mean to confine the opinion to cases like the present, in which the duty demanded was paid under protest, stating specially the ground of objection. Where no such protest is made, the duties are not illegally exacted, in the legal sense of the term. For the law has confided to the Secretary of the Treasury the power of deciding, in the first instance, upon the amount of duties due on the importation. And if the party acquiesces, and does not by his protest appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal, to which the law has confided the power of deciding the question."

"Money is often paid under the decision of an inferior court, without appeal, upon the construction of a law which is afterwards, in some other case, in a higher and superior court, determined to have been an erroneous construction. But money thus paid is not illegally exacted. Nor are duties illegally exacted where they are paid under the decision of the collector, sanctioned by the Secretary of the Treasury, and without appealing from that decision to the judicial tribunals by a proper and legal protest. Nor are they within the principle decided by the court in the case before us."

It must be conceded that this language should be construed with reference to the case before the court, and considered in connexion with the context. The case was an action brought against a collector under the act of 1845. The context is as follows: "The duty of 100 *per cent. ad valorem* was chargeable on the quantity of brandy actually imported, and not on the contents stated in the invoices. This over-charge was therefore illegally exacted, and the defendants in error were entitled to recover back the amount." If this language had gone forth to the world unexplained, the learned Chief Justice might have been understood as announcing a principle which he did not mean to announce. Taken by itself, it, in plain and unambiguous terms, declares, that where there is an over-charge of duty, the duty is *therefore* illegally exacted, and the party paying is entitled to recover back the amount. Nothing is said about a protest, or of what character the protest shall be. And yet this language was used in a case occurring under the act of 1845. Without an explanation, the opinion of the Supreme Court might have been understood to be, that a protest is not necessary to sustain such an action. In order, therefore, that the opinion of the court might not be misunderstood, the Chief Justice proceeds to give the explanation, which is to be found in the remarks which have been quoted. The whole object of it was more fully to declare the grounds on which an action, under the act of 1845, can be maintained.

Much stress was laid in the argument of this case upon this language: "Where no such protest is made, the duties are not illegally exacted, in the legal sense of the term." It was urged, with great earnestness, that it was used in its broadest and most general sense. But it is clear that it is not to be so understood. Its object was to explain the meaning of that "illegal exaction," which the learned judge had just said would entitle a party to recover back the money paid, in an action against the collector. He accordingly, in substance, says, that, to maintain such an action, the law requires a protest, stating specially the ground of objection, and in the sense of that law there can be no illegal exaction without such a protest. This was indubitably his meaning. He would justly be regarded as using language wholly extra-judicial, if he is to be understood in any other sense.

It was urged by the solicitor that the Chief Justice is to be understood as giving an exposition of the act of August 8, A. D. 1846. We think that there is no just ground for supposing that such was his intention. That act in no way related to the case which he was considering. It had not been referred to by counsel, nor was a

reference to it necessary to the elucidation of his views. And besides, if the Supreme Court is to be understood as putting a construction upon the act of 1846, then it follows, that, in the opinion of that court, no duties can be duties *illegally exacted* within the meaning of that act, unless they were paid under the protest required by the act of 1845. But many of the cases provided for in the second section of the act of 1846 originated long before the act of 1845, for it expressly embraces "such sums of money as have been illegally exacted * * * since the third of March, eighteen hundred and thirty-three." Prior to the act of 1845 it was not usual in a protest to state the grounds of objection, nor was it necessary to do so. The construction, therefore, imputed to the Supreme Court, if adopted, would, in all probability, to a great extent, repeal the act of 1846.

The remarks which refer to the decision of the Secretary of the Treasury, are to be explained in the same way as those which we have already particularly noticed. And, moreover, it was not the intention of the Supreme Court to characterize the decision of the Secretary of the Treasury as a judicial decision; for no part of the judicial power, under the constitution of the United States, can be conferred upon an executive officer. Every ministerial officer is obliged to make a decision, in the first instance, in every case in which he is called upon to act.

If the act which he is required to do be *executive*, and not merely *ministerial* in its character, his decision is final as regards executive action, and no appeal lies from it to the courts, nor can they revise his judgment. (*Decatur vs. Paulding*, 14 Peters' R., 497; *Bradshear vs. Mason*, 6 How. R., 92.) But it is not conclusive upon the rights of the party interested, in the sense in which a judicial decision would be. He would still be entitled to appeal to Congress. (14 Peters' R., 522; *Reeside vs. Walker*, 11 How. R., 272.)

It was such a decision, on the part of the Secretary of the Treasury, to which the Chief Justice referred; and all that he meant to say was, that if the importer does not appeal from it to the judicial tribunals, in the manner prescribed by the act of 1845, he cannot maintain an action under that act against the collector; but in the sense of that act the duties are not illegally exacted.

That the Chief Justice is to be understood as we understand him, is rendered yet more manifest by what was said by him in the case of *Mason and Tullis vs. Kane*, in the circuit court of Maryland. In that case there was a protest, but not such a protest as the act of 1845 requires, and the action failed on that ground. In delivering the opinion of the court, the Chief Justice said: "It is unnecessary, therefore, to inquire whether the objections now made would have been valid if set forth in the protest. If improperly charged, it is, no doubt, yet in the power of the administrative department to do justice to the claimant; but no action can be maintained under the act of 1845." Now, it seems to us that if it was the opinion of this learned judge that where there is no protest duties are not illegally exacted—understanding those terms in their largest and most comprehensive sense—but, on the contrary, however improperly they be charged, or under whatever circumstances they be paid, if there be

no protest, the party has no just claim or legal demand against the United States for re-payment, he could not have made the suggestion, that, nevertheless, in such a case the administrative department would have it in its power to do justice to the claimant. Upon the hypothesis that his opinion goes to the extent contended for, he must have considered that justice had already been done according to law, and did not still remain to be done anywhere—that the claim had been adjudicated and settled by “the decision of the tribunal to which the law has confided the power of deciding the question,” and the money paid without appeal to a higher tribunal. He surely did not suppose that the administrative department could give relief in a case so circumstanced.

But it is urged that the suit against the collector is substantially a suit against the United States, and that, therefore, if a party fails to avail himself of that remedy, he can have no just claim against the United States. In the case of *Mason and Tullis vs. Kane*, to which we have already referred, the following remarks were made by Mr. Chief Justice Taney: “For this suit, although in form against the collector, for doing an unlawful act, is, in truth and substantially, a suit against the United States. The money is in the treasury, and must be paid from the treasury if the plaintiff recover. And as the United States cannot be sued and made defendants in a court of justice without their consent, they have an undoubted right to annex to the privilege of suing them any conditions which they deem proper. And in the exercise of this power they have granted this privilege in the form of a suit against the collector, where duties are supposed to be over-charged, upon condition that the claimant, when he pays the money, shall give a written notice that he regards the demand as illegal, and means to contest the right of the United States in a court of justice; and stating also, at the same time, distinctly, the specific grounds upon which he objects. This is the condition upon which he is permitted to sue the collector, and thus to appeal from the administrative to the judicial department of the government. It is a condition precedent.” But it must be recollected that this was the very case in which the same distinguished judge said: “If improperly charged, it is, no doubt, yet in the power of the administrative department to do justice to the claimant.” We have already shown that the latter remarks are wholly inconsistent with the conclusion which has been deduced from the former. The consequence of a failure to make a proper protest is clearly and forcibly stated in the concluding sentence of the opinion of the court: “But no action can be maintained under the act of 1845.”

The truth is, that in order to give to the act of 1845 the construction contended for on the part of the United States, it would be necessary to insert in it words which it does not contain. It seems to contemplate two modes of reimbursing to an importer money paid for duties not imposed by law—the one by the action of the Secretary of the Treasury, and the other by a suit against the collector. Both these modes, by the express terms of the act, require a protest in writing, signed by the claimant, stating the grounds of objection. But there is still another mode known to the law, and familiar in the

practice of the government, and is not embraced by the act of 1845. In order to embrace it by that act, words must be added thereto, or inserted therein, to the following effect: "Nor shall any money paid for duties, not imposed by law, be refunded by the United States to any claimant, unless, at or before the payment thereof, he make such a protest as is required by this act." To add words like these to a statute is far beyond the power of the judiciary. It falls exclusively within the province of the legislature. However much we might suppose that an enlightened public policy requires that such a provision should be made by law, we have no authority to make it. In the construction of a statute, we can only declare what it is, not what it ought to be.

The condition, then, of the petitioner, at the time of the passage of the act of Congress establishing this court was, that he had a just claim against the United States for money paid them by mistake for duties not imposed by law, but no enforceable remedy for its recovery. He had, by reason of the very mistake under which the payment was made, lost his remedy against the collector, and the Secretary of the Treasury had decided that his claim is "inadmissible under the laws." But his right to petition the legislative department of the government still remained in unimpaired vigor. His claim, as at its origin, still rested on an implied contract on the part of the United States to repay him the money. This money was his property, not theirs; and they were obliged, by the ties of natural justice and equity, to refund it; and, being so obliged, the law, according to principles universally acknowledged, (*Cary vs. Curtis*, 3 How. R., 249,) had implied a promise on their part to repay it to him. This promise had not been performed. The money was still in the treasury of the United States, and his right to demand its repayment had not been waived or released. On the contrary, his claim still continued unsatisfied and undischarged. But the act to which we have referred makes it the duty of this court to "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." (10 Stat. at Large, p. 612.) This case comes within the very words of that act. It is emphatically one of the cases for which it was designed to provide. It is neither more nor less than a claim founded on an implied contract with the government of the United States. It seems to us, therefore, that if it be sustained by proof, the petitioner's right to relief is unquestionable.

Let an order be made authorizing the taking of testimony in this case.

WILLIAM W. SPENCE & ANDREW REID vs. THE UNITED STATES.

Scarburgh, J., delivered the opinion of the court.

About the 18th day of October, A. D. 1849, the petitioners imported into Baltimore, from Savanah la Mar, in Jamaica, a cargo of pimento, which they entered and warehoused. They purchased the pimento in the ordinary mode of bargain and sale, and the invoice

and entry truly represented its actual value at the time of its shipment at Savannah la Mar for Baltimore.

The collector caused a valuation of the pimento to be made by the official appraisers, and the petitioners being dissatisfied with their valuation, demanded a reappraisement by merchant appraisers. The collector thereupon appointed two merchant appraisers, who reported that they were satisfied that the price specified in the invoice (2½d. per pound) was the true cost of the pimento at Savannah la Mar; but that inasmuch as pimento at St. Ann's Bay, Jamaica, was somewhat higher about the time of the exportation from Savannah la Mar, the petitioners ought to be permitted to amend their entry, pay duties on 2½d. per pound, and be excused from paying any penalty. The petitioners then applied to the collector to be permitted to amend their entry and be governed by the award of the merchant appraisers; but he refused to do this, and also omitted to order such an appraisement of the pimento as the petitioners claim that they were by law entitled to. They insist that an appeal having been taken and allowed from the appraisement of the official appraisers, and not withdrawn, the collector was not authorized to exact duties and a penalty upon the enhanced valuation made by the official appraisers. They further insist that there then was and now is no legal value whereon to compute the duty upon the pimento, except that specified in the invoice and entry.

In the original invoice, there was a clerical error in deducting the tare from the gross weight of the pimento. Five *per cent.* ought to have been deducted for tare, but only one-tenth of five *per cent.* was in fact deducted therefor. The gross weight, as stated in the invoice, was 87,717 pounds, and a deduction of only 439 pounds, instead of 4,386 pounds, for tare, was made. The error was discovered on the weigher's return, which showed the net weight to be 84,512 pounds, being 2,776 pounds less than the quantity erroneously stated in the invoice.

A large portion of the pimento was withdrawn from the warehouse and re-exported, and the residue was withdrawn for home consumption.

The petitioners also state as follows: "But the collector aforesaid, in violation of the statutes, exacted duties on the pimento erroneously stated in the invoice as 87,278 pounds, at a valuation of 2½d. per pound, Jamaica currency, thereby exacting \$107 82 more than the legal duty, and penalties amounting to \$899, being \$1,006 82, or thereabouts, over and above the amount of duties imposed by law upon the pimento imported and warehoused so as aforesaid; all which your petitioners were required to pay, and did pay, to the collector aforesaid, (remonstrating and protesting nevertheless,) in order to obtain possession of the said pimento."

An action was instituted by the petitioners, in the name of Mason & Tullis, their consignors, against the collector in the circuit court of Maryland; but it failed upon the ground that the protest did not set forth distinctly and specifically the grounds of objection to the payment of the duties.

The question of most importance in this case will probably arise

upon the appraisement made by the merchant appraisers. We do not deem it necessary now to consider it. Although that appraisement seems to be set forth in substance in the petition, yet it is not actually set forth, and it would be improper in us to undertake to determine either its validity or legal effect without knowing precisely the very terms in which it is expressed. If it be valid, and its legal effect be that it values the pimento at 2½d. per pound, then, as that value exceeds the invoice value by more than ten *per cent.*, it was not an illegal exaction for the collector to demand the penal duty of twenty *per cent.* upon the whole importation. By the express terms of the seventeenth section of the act of 1842 the appraisement of the merchant appraisers is final. Its language is: "and the appraisement thus determined shall be final, and deemed and taken to be the true value of said goods, and the duties shall be levied thereon accordingly, any act of Congress to the contrary notwithstanding." (5 Stat. at Large, p. 564. See the case of *Bartlett vs. Kane*, 16 How. R., 263.)

It is supposed, however, that, even if the appraisement of the merchant appraisers be valid, and duly estimates the pimento at 2½d. per pound, yet, inasmuch as the value of the net quantity returned by the gauger, even at that rate, does not exceed by ten *per cent.* the value of the gross quantity stated in the invoice at 2½d. per pound, the petitioners were not subject to the penal duty exacted of them. Under the 8th section of the act of 1846 it is made the duty of the collector, within whose district goods may be imported or entered, to cause the dutiable value of such imports to be appraised, estimated, and ascertained, in accordance with the provisions of existing laws; and if the appraised value thereof exceed by ten *per centum* or more the value declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid, a duty of twenty *per centum ad valorem* on such appraised value. (9 Stat. at Large, p. 43.) The term "value," in this statute, is used in the sense of "price." Hence it has been held, that, although the proviso declares, that under no circumstances shall the duty be assessed upon an amount less than the invoice *value*, yet a reduction of the invoice quantity is not a reduction of the invoice *value*, because it is not a reduction of the invoice *price*. (*Marriott vs. Brune*, 9 How. R., 619.) If, then, the price ascertained by the appraisers exceed by ten *per centum* or more the *price* declared on the entry, the penal duty may be exacted. If, therefore, the appraised value in this case turn out to be 2½d. per pound, as that exceeds by more than ten *per centum* 2½d. per pound, the value declared on the entry, the exaction of the penal duty on the quantity of pimento actually imported was not illegal.

But it is contended that, although these principles may be sound as to the pimento withdrawn for home consumption, yet the penal duty could not be exacted upon so much of it as was re-exported. This point has been settled by the Supreme Court of the United States, in the case of *Bartlett vs. Kane*, 16 How. R., 263. It was there held, that the provision in the act of Congress permitting goods which have been warehoused to be exported without the payment of duties thereon, does not extend to penal duties. The court say :

"We are satisfied that the existing laws relating to exportations, with the benefit of drawback, do not apply to relieve the person who has incurred, by an undervaluation of his import, this additional duty, from the payment of any portion of it." (16 How. R., 274.)

But as to the pimento—the 2,776 pounds—which constituted the difference between the gross quantity stated in the invoice and the net quantity shown by the weigher's return, no duty could have been legally exacted thereon. It was not imported. (*Marriott vs. Brune*, 9 How. R., 619.) But the collector exacted from the petitioners both the regular and the penal duties on this deficiency, and they paid them under protest, in order to obtain possession of the pimento actually imported. The money was paid under an illegal demand made *colore officii*, and the payment became necessary to enable the parties to exercise a legal right. It was paid unwillingly for duties not imposed by law, in order to enable the parties to obtain possession of their goods. They were coerced to make the payment in order to escape a greater evil. The payment was caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain the possession of their property except by submitting to the payment. The demand of both the duties and the penalty upon the 2,776 pounds of pimento was illegal. The payment of both was wrongfully imposed on the importers, and was submitted to merely as a choice of evils. They were unwilling to pay either the duties or the penalty, and must be considered, therefore, as forced into the payment of both by the collector, *colore officii*, through the invalid and illegal course pursued in exacting duties upon goods which the petitioners had not imported, however well-meant may have been the views of the collector. The money was thus obtained by a moral duress not justified by law, which was not submitted to by the importers, except to regain possession of their property withheld, *quoad* this subject, upon grounds manifestly wrong. The payment, therefore, was indubitably not voluntary. (*Maxwell vs. Griswold*, 10 How. R., 242, 256.)

In the case of *James Beatty's Executor vs. The United States*, recently decided in this court, it was held, that the act of Congress of February 26, A. D. 1845, requiring the protest to be in writing, and signed by the claimant at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof, whilst it applies to the action against the collector, still does not affect the party's right to relief against the United States, if it be otherwise well founded. Although, therefore, the protest in this case was not sufficient under that act to enable the claimants to maintain an action against the collector, yet that circumstance does not impair their right to relief in this court. The money which was illegally obtained from them has gone into the treasury of the United States, and under circumstances which, in a case between man and man, would raise an implied promise to refund it. There can be no sound principle of law, as there is none in good morals, which would justify the detention by the United States of money thus obtained. They are bound to repay it upon the same principle which would require its repayment by an individual under

similar circumstances. The money not being theirs, but the property of the petitioners, the United States cannot conscientiously retain it. It is therefore their duty to return it; and wherever there is a duty, there is a corresponding obligation to perform it. Duty creates the obligation to pay back the money, and from this obligation the law implies a promise to repay it. Hence arises the implied contract on the part of the United States to refund to the petitioners the money illegally exacted from them for duties on pimento which they did not import. See the case of *Sturges, Bennet & Co. vs. The United States*, recently decided in this court, and the cases there cited.

Let an order be made authorizing the taking of testimony in this case.

DAVID WOOD vs. THE UNITED STATES.

Scarburgh, J., delivered the opinion of the court.

This case, in its principal features, is similar to the case of *Sturges, Bennet & Co.*, recently decided by this court, and the principles adjudicated in that case have been reargued in this. The object was to bring those principles in review in this case, to be reconsidered, and again passed upon by this court, in order that, if we should find that our views were in any respect incorrect or unsound, the error may be corrected.

In the case of *Sturges, Bennet & Co.*, it was held that, where brandy or other liquor is imported into the United States, under the tariff act of 1846, and the estimated quantity on which duties are paid by the importer exceeds the actual quantity, there is an implied promise on the part of the United States to repay to the importer the duties upon such excess, and they may be repaid by the Secretary of the Treasury under the act of March 3, A. D. 1839; and if such repayment be not made, the importer is entitled to relief in this court.

According to the practice which prevails in the custom-houses, after the estimated duties are paid, steps are taken by the proper officers, under instructions from the Secretary of the Treasury, to ascertain the duties actually imposed by law; and it is insisted that, if upon this adjustment no excess over the estimated quantity appears, and before or at the time of its completion no protest is made by the importer, notwithstanding there may be in fact an excess, and that excess shown by the official return of the gaugers, still the duties thereon are not illegally exacted. To mitigate the apparent harshness of this proposition, the attempt is made to support it on the ground that, until the adjustment is completed, no payment is actually made, and the failure to make the protest renders the payment voluntary. This doctrine, it is insisted, is sustained by the decisions of the courts of the United States.

The acts of Congress, in terms, require that the estimated duties on goods not warehoused shall be *paid* before a permit for landing them shall be granted. (1 Stat. at Large, p. 664, § 49; 1 *ibid.*, p. 673, § 62; 9 *ibid.*, p. 53, § 1.) But, notwithstanding this express language,

it is supposed that this is not a payment, but something rather in the nature of a pledge or deposit than a payment; and the language of Mr. Chief Justice Taney, in the case of *Brune vs. Marriott*, in the circuit court of Maryland, and of Mr. Justice Woodbury, in the same case, in the name of *Marriott vs. Brune*, 9 How. R., 636, has been cited in support of this doctrine. The language referred to for this purpose is as follows: "The protest is not required to be made on or before the payment of what are called the estimated duties; for this payment is necessarily regulated by the invoice quantity as well as the invoice price. The importer cannot, at that time, know whether there has been any loss by leakage; nor can he know, after it has been ascertained by the weigher and gauger, whether the collector will exact duties upon the amount stated in the invoice.

"The payment is legally made when the duties are finally determined and the amount assessed by the collector; and a protest before or at that time is sufficient notice, as it warns the collector, before he renders his account to the Treasury Department, that he will be held personally responsible, if the portion disputed is not legally due, and that the claimant means to assert his right in a court of justice.

"The payment of the money upon the estimated duties is rather in the nature of a pledge or deposit than a payment. For it remains in the hands of the proper officer, subject to the final assessment of the duties; and if more has been paid than is due, (which is most commonly the case,) the overplus belongs to the importer, and is returned to him." Per Taney, C. J., in *Brune vs. Marriott*.

"But where the duties had not been closed up in any cases, when the written protest, in April, was filed—though the preliminary payment of the estimated duties had taken place—the court justly considered the protest valid. Because, till the final adjustment, the money remains in the hands of the collector, and is not accounted for with the government, and more may be necessary to be paid by the importer." Per Woodbury, J., in *Marriott vs. Brune*, 9 How. R., 636.

In order correctly to understand this language, it may not be improper to refer to the second section of the act of 1839. It is as follows:

"That from and after the passage of this act, all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the Treasurer of the United States, kept and disposed of as all other money paid for duties is required by law, or by regulation of the Treasury Department, to be placed to the credit of the said Treasurer, kept and disposed of, and shall not be held by the said collector, or person acting as such, to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid; but whenever it shall be shown to the satisfaction of the said Secretary of the Treasury, that in any case of unascertained duties, or duties paid under protest, more money has been paid to the collector, or person acting as such, than the law requires should have

been paid, it shall be his duty to draw his warrant upon the Treasurer, in favor of the person or persons entitled to the over-payment, directing the said Treasurer to refund the same out of any money in the treasury not otherwise appropriated." (5 Stat. at Large, p. 348-'9.)

Taking this act in connexion with the remarks of the learned judges above quoted, it is apparent that no case could be selected which would more clearly show that justice to every judge requires that his remarks in a case should be referred exclusively to that case itself; for otherwise he will be often understood to express views which had never entered his mind. It will not do to understand Mr. Justice Woodbury literally, and as asserting a general proposition, when he says: "Because, till the final adjustment, the money remains in the hands of the collector, and is not accounted for with the government, and more may be necessary to be paid by the importer." The statute expressly requires that it—the very money paid for unascertained duties—shall be placed to the credit of the Treasurer of the United States, and *shall not* be held by the collector, to await *any* ascertainment of duties. It also expressly requires that the money shall be kept and disposed of as all other money paid for duties is required by law, or by regulation of the Treasury Department, to be kept and disposed of. And, moreover, the only mode prescribed by the act in which any excess of duties beyond what the law requires can be repaid to the importer, is under a warrant from the Secretary of the Treasury upon the Treasurer. So that, immediately upon the payment of the money, it passes into the treasury of the United States. It is too plain to admit of question, that Mr. Justice Woodbury did not mean to assert anything in conflict with these unequivocal requirements. The question before the court was, whether, under the act of 1845, a protest made at or before the final adjustment of the duties in the custom-house was sufficient. To that question, and to that alone, the court is to be considered as having addressed itself; for there is no judge who would not regard it as an act of injustice, that his remarks in any case should be referred to any other standard. It is not possible for the human mind to be sufficiently circumspect to guard against error, if a broader responsibility should be imposed. The court decided—and upon that point there can now be no difficulty—that the *payment* contemplated by the act of 1845 is not made until the adjustment of the duties is completed. It was to this point that the remarks of Mr. Justice Woodbury were directed, and justice to him, as well as to truth, requires that they should be circumscribed and limited by it. In like manner, Mr. Chief Justice Taney, in saying that "the payment is legally made when the duties are finally determined and the amount assessed by the collector," is surely not to be understood as asserting that the payment of unascertained duties is *not* legally made, because the law in express terms requires it to be made. All that he meant to say was, that the payment of duties, in the sense of the statute of 1845, is made when the duties are finally adjusted. In using the words "legally made," he merely meant "according to the act of 1845." In the case of *Cary vs. Curtis*, 3 How. R., 236, where the character of the payment of estimated duties came more directly in question, it is treated and considered not only as a

payment, but as a payment into the treasury of the United States, and the collector is spoken of as the mere bearer (3 How. R., 241;) the mere instrument for the transfer (3 How. R., 249) of the money to the treasury of the United States.

And so Mr. Chief Justice Taney, in saying that "payment of the money upon the estimated duties is rather in the nature of a pledge or deposit than a payment," must be understood as addressing himself to the case before him. He did not mean to assert the general proposition that such a payment is not a payment in any sense. He was laboring to show that it was not *the* payment to which the act of 1845 refers. The object was to ascertain the interpretation to be put upon that act. The payment of unascertained duties is a payment—he so calls it; but then he suggests it is not final—all that the collector has to do in connexion with it has not been done until the duties are finally adjusted. It was as if he had said, that the statute, in requiring the protest to be made "at or before the payment" of the duties, meant that it should be made at or before the final adjustment of them at the custom-house. This construction is inferred, in part, from the consideration that the action mentioned in the act of 1845 is an action against the collector. And it is apparent that if this construction had not been given to that act, it would, to a great extent, have failed to answer the purposes for which it was enacted. The instances in which protests would have been made, at or before the payment of the estimated duties, would, in all probability, have been rare. A liberal interpretation of it was wisely adopted by the Supreme Court, in order to carry out the intention of Congress, and to render the privilege which it gave, of a suit against the collector, of some practical value.

But what does the learned Chief Justice mean, in saying that "the payment of the money upon the estimated duties is rather in the nature of a *pledge* or *deposit* than a payment?" He has given his own explanation: "For it remains in the hands of the proper officer, subject to the final assessment of the duties; and if more has been paid than is due, (which is most commonly the case,) the overplus belongs to the importer, and is returned to him." The same view of the subject is somewhat more fully expressed by this court, in the opinion of the court in the case of *Sturges, Bennet & Co. vs. The United States*, as follows: "So far, therefore, from unascertained duties being duties illegally exacted, they are always demanded and paid in strict conformity to law. The very terms imply that duties are to some extent imposed and payable in the particular case, but that the true amount is unknown and undetermined at the time of payment. The law, in its requirements upon this subject, looks both to the security of the United States, and to the interests of the importer. The just demands of the United States are secured by the payment of the estimated duties, and the goods are liberated without any unnecessary delay, so that they may at once go into the possession of the importer and enter into his business. But the object, as regards the United States, is to secure their just demands, and nothing more; and the payment is made under an implied contract on the part of the United

States that the excess, if any, beyond the amount of duties actually imposed by law, shall be refunded to the importer."

It seems to us, therefore, that the authority relied upon to show that when money is paid for estimated duties, it is not a payment, wholly fails to support that proposition. It is indubitably clear that the point did not arise in the case referred to, and was not discussed by the judges. It is equally clear that it is a payment. It is made on account of a debt due by the importer to the United States at the time of its payment, and though not then ascertained, yet capable of ascertainment from elements then in existence. It is made not only according to law, but in obedience to the express requirements of law. It is not, therefore, in its nature, a voluntary payment—i. e., it is in no sense a gift to the United States. If it is at any time to be so regarded, it becomes so by matter *ex post facto*. It is not of that character at its inception—at the time it is made. On the contrary, it is conceded that it is made under such circumstances, that if more is "paid than is due, (which is most commonly the case,) the *overplus* belongs to the importer, and is returned to him." The overplus is returned to him, under an implied contract on the part of the United States to return it to him. The very money paid by him is not returned, as would be done if it had been a mere pledge or deposit, but an equivalent amount. The actual money paid, under the express requirements of the law, passes directly and immediately into the treasury of the United States, and is there mingled with other money received for duties, and kept and disposed of as such other money is kept and disposed of. The repayment, therefore, is made in discharge of a contract on the part of the United States to make it, and not as the return of a pledge or deposit. Such a return has become wholly impracticable, for the very money paid cannot be separated or distinguished from any other money belonging to the United States. That money became, by virtue of the law under which it was paid, the property of the United States; and to say that it belongs to the importer, is but a mode of expressing the obligation of the United States to repay it.

If this be the correct view of this subject—and that it is, there does not seem to us to be any room for doubt—the contract of the United States to repay the excess to the importer is like any other contract into which they enter, and to be governed by the same principles; and it certainly cannot be necessary to cite authority to show that, in general, those principles are the same which prevail between individuals. If such a contract existed between individuals, how could it be discharged? We need not repeat here the various modes known to the law by which this can be done. The ground on which it is claimed here to have been done, is, that the money due under that contract has been voluntarily given to the United States, by the failure to make a protest at or before the final action of the collector in the adjustment of the duties. It must be recollected that this view is presented on common law principles—the principles which govern contracts between man and man. Whether the statute law gives the failure to make a protest the effect claimed for it, is another question. But, according to the principles which govern contracts

between man and man, a *gift* of what is due on a contract cannot be made to the person who owes it, otherwise than by a release under seal. Mention is sometimes made of releases not under seal; but they are ineffectual, without a consideration to support them. Even if part of the debt be paid, and the creditor gives a receipt, expressing that the money is received in full of all demands, still the obligation to pay the balance will remain wholly unaffected, unless there be some additional consideration to discharge it. Co. Litt., (Thomas's ed.,) 452; Bac. Abr., "Release," (A.); *Cordwint vs. Hunt*, 8 Taunt. R., 596; *Preston vs. Christmas*, 2 Wils. R., 86; *Lodge vs. Dicas*, 3 B. & Ald. R., 611; *Fitch vs. Sutton*, 5 East. R., 230; *Whitehill vs. Wilson*, 3 Penn. R., 405. A contract to pay money upon an executed consideration must be satisfied or released. The failure to make a protest is neither a satisfaction nor a release.

But it is supposed that the Supreme Court of the United States, in the case of *Lawrence vs. Caswell*, 13 How. R., 496, held, that where money is paid for duties without a protest, the payment is voluntary. The language from which this is inferred is as follows: "For the law has confided to the Secretary of the Treasury the power of deciding, in the first instance, upon the amount of duties due on the importation. And if the party acquiesces, and does not by his protest appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal to which the law has confided the power of deciding the question.

"Money is often paid under the decision of an inferior court, without appeal, upon the construction of a law which is afterwards, in some other case, in a higher and superior court, determined to have been an erroneous construction. But money thus paid is not illegally exacted. Nor are duties illegally exacted where they are paid under the decision of the collector, sanctioned by the Secretary of the Treasury, and without appealing from that decision to the judicial tribunals by a proper and legal protest. Nor are they within the principle decided by the court in the case before us." (13 How. R., 596.)

Our views as to the meaning of this language were presented in the case of *Beatty's Executor vs. The United States*, and we have found no reason to change them. We consider, too, our remarks upon the language already quoted from the opinions of Mr. Chief Justice Taney and Mr. Justice Woodbury, in *Brune vs. Marriott* and *Marriott vs. Brune*, as applicable here. In assimilating a payment of duties without a protest to the payment of money under the decision of an inferior court, without appeal, the Supreme Court merely meant to say, that a payment of duties without a protest left the importer without a legal remedy in the judicial tribunals. That court did not intend to say that the rights of the importer were concluded by the decision of the collector, sustained by the Secretary of the Treasury, to the same extent in all respects as they would be by the judgment of an inferior court. To have gone thus far, would have rendered the remarks of the learned Chief Justice extra-judicial; for the point was neither involved in the case, nor necessary to illustrate the question under discussion. And, moreover, such a doctrine cannot be sustained. Under the act of 1839 it is made the duty of

the Secretary of the Treasury, whenever it shall be shown to his satisfaction, that, in any case of unascertained duties, more money has been paid to the collector than the law required should have been paid, to cause it to be refunded to the importer. In determining this question, the Secretary of the Treasury is not confined to the decision of the collector, though it may have been made under his instructions. The language is general: "Whenever it shall be shown to the satisfaction of the Secretary of the Treasury." No matter, then, how the error may be shown; if it be shown to his satisfaction, the Secretary of the Treasury must cause the money to be refunded. And so, under the old system, where it was sufficient, in order to obtain a permit to land the goods, to secure the payment of the duties, and credit was given, the condition of the bond was, to pay "the sum of ———, or the amount of the duties *to be ascertained* as due." (1 Stat. at Large, p. 675.) Can it be pretended that, in an action on such a bond, the importer would be concluded by the adjustment made by the collector? Such an idea, we suppose, was never entertained. And, again, under the present system, where goods are warehoused, the condition of the bond prescribed by a regulation of the Treasury Department is, to pay "the sum of ——— dollars ¹⁰⁰⁰, or the amount of the duties *to be ascertained* as due and owing on the aforesaid goods." (Mayo's Synopsis, p. 331.) If, in such a case, after the final adjustment made by the collector, the importer should tender a less sum than the amount appearing to be due upon such adjustment, but the sum actually imposed by law, and it should be refused, and thereupon an action of detinue should be instituted against the collector for the recovery of the goods, would it be a sufficient defence, excluding all further inquiry, to show the adjustment made by the collector? We suppose that no one would pretend that such a doctrine could be maintained. If, then, the adjustment of the collector, even when no protest is made, would not conclude the rights of the importer in any of the cases suggested, upon what principle could it have that effect, where money is paid for unascertained duties, and no protest is made at or before such adjustment is concluded? None can be suggested. We are entirely satisfied that the Supreme Court never intended to say, even *arguendo*, that a failure to make a protest renders the payment of unascertained duties a voluntary payment.

But it may be urged, that an application to the Secretary of the Treasury, under the act of 1839, is not an application to a judicial tribunal, and that in the other cases supposed—the one arising under the old and the other under the present system—the right of the importer to redress before the judicial tribunals never depended upon a protest. All this we concede. It is true now, and such has always been the doctrine upon this subject, that the sole purpose and use of a protest or notice, in the sense in which we are now considering it, are to enable a party mispaying money to a collector or other agent to appeal to the judicial tribunals against the collector or other agent; and that the failure of such party to avail himself of it does not, and never did, affect his right to redress as against the principal. No change whatever has been made by any act of Congress as regards the protest in this respect.

We do not mean to say that no case can occur where the payment of duties without a protest would be voluntary. All that we mean to say is, that a payment of unascertained duties, where no protest is made, is not for *that reason* voluntary: it is not so at its inception, and it does not become voluntary by reason of the failure to make a protest at or before the final adjustment of the duties made at the custom-house. This is the point before us, and we are not at liberty to go beyond it. The Supreme Court, in the case of *Elliott vs. Swartwout*, 10 Peters' R., 137, say, that where an excess of duties is paid to a collector, and by him, in the regular or ordinary course of his duty, paid into the treasury of the United States, he, the collector, acting in good faith, and under instructions from the Treasury Department, and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount given him, it is to be considered a voluntary payment by mutual mistake of law; and, in such case, no action will lie to recover back the money. There can be no doubt that, in such a case, no action will, or ever would, lie to recover back the money against the collector. Whether it is to be considered a voluntary payment, by mutual mistake of law, is a question not necessary for us now to consider. We do not design to indicate whether we regard it as having been adjudicated in that case, or whether we approve or disapprove of it. All that we mean to say is, that this is not such a case. When such a case shall arise before us, we shall not hesitate to meet the responsibility of deciding it.

But it is supposed that the case of *The United States vs. Clement & Newman*, Crabb R., 499, is analogous to this case. The decision in that case was made in the form of an instruction to the jury, and merely conformed to the doctrine stated by the Supreme Court, in the case of *Elliott vs. Swartwout*, which we have already noticed. An action of debt was brought on a custom-house bond, and the defendant relied on a set-off for money paid for an over-charge of duties on a previous importation. It is not expressly stated that the set-off was for a payment made in discharge of a custom-house bond, but the importation occurred under the credit system, and the report states: "The defendants claimed to set off against the demand of the United States both one-half of the sum of \$131 61, alleged to be an over-charge on this importation, the present bond being for one-half of the gross duties, and also the sum of \$345 22, being an alleged over-charge *under similar circumstances*, paid by them on a former occasion." It is apparent, therefore, that as regards the question now under consideration, the point decided merely was, that where money is paid *voluntarily*, by mistake of law, in discharge of a custom-house bond given for duties not imposed by law, it cannot be recovered back. Whether this decision was rightly made is a question which it is not either necessary or proper for us now to consider, simply for the reason that this case is wholly unlike the case of *The United States vs. Clement & Newman*. Here, the claim is for money paid for estimated duties beyond the amount actually imposed by law. It was paid in obedience to the express mandates of the law, and an objection to the payment at the time it was made would have been ridiculous and absurd. As

the importer did not intend to warehouse his goods, he could not even have landed them, much less have obtained possession of them, without the payment of the estimated duties. He had but one course to pursue. The payment was not a matter of choice, but of necessity. There was no escape from it. The law commanded it. And, moreover, so far from being able to ascertain to what extent the estimate was erroneous, he had no means of determining whether it was erroneous at all. This depended upon the return of the weighers and gaugers, and the law did not permit them even to begin their work till after the estimated duties were paid. But, in the case of *The United States vs. Clement & Newman*, the payment was made in discharge of a custom-house bond long after the weighers and gaugers had made their return, and when all the *facts* were ascertained and as well known as they were at the time of the trial. It might have been true that the payment was *voluntary*, and if it was, the money, in the opinion of the judge, could not be recovered back. But it cannot be true, either in fact or in law, that the payment of estimated duties is *voluntary*, in the technical sense of that term.

Whilst it is conceded that prior to the act of 1839 an action might be maintained against a collector for money paid for unascertained duties, exceeding the amount actually imposed by law, where no protest was made, still it is urged that this could be done only where, upon the final adjustment by the collector, an excess was ascertained and remained in his hands, without being paid into the treasury of the United States. This notion has arisen from a misconception of the object of a protest. That object, as stated in all the cases, was merely to warn the collector that the party means to hold him personally responsible for the money. It was by this means that he secured his right to appeal to the judicial tribunals against the collector. It involved no new principle, nor was it peculiar to the case of an importer and a collector. It is well known and understood in the law of agency. The principle there is, that where money is paid to an agent for his principal, under such circumstances as would entitle the person making the payment to recover it back from the principal, if it had been directly paid to him, a suit may be maintained therefor against the agent, if, before he paid the money to his principal, notice was given to him that it would be reclaimed from him. The notice does not create the right to recover back the money; that results from other circumstances. The notice is necessary, only because the agent is not liable in an action by the person who has mispaid the money, if he has paid it over to his principal without the notice. The reason is, that it is just that one man should not be the loser by the mistake of another; and the person who made the mistake is not without his redress, but *has his remedy over against the principal*. And hence it is, that if it has not been paid over, but remains in the agent's hands, it may be recovered back even without notice. In such cases the action against the agent will be considered as if it were an action against the principal, and determined on the like principles. *Buller vs. Harrison*, Cowp. R., 566; *Burrough vs. Skinner*, 5 Burr. R., 2639; *Cox vs. Prentice*, 3 M. & S., 348; *Pond vs. Underwood*, 2 Ld. Raym. R., 1210; *Cary vs. Webster*, 1 Str. R.,

480; *Saddler vs. Evans*, 4 Burr. R., 1986; *Stevenson vs. Mortimer*, Cowp. R., 806; *Greenway vs. Hurd*, 4 T. R., 554; *Hearsey vs. Pruyn*, 7 Johns. R., 182; *Ripley vs. Gelston*, 9 Johns. R., 309; *Elliott vs. Swartwout*, 10 Peters' R., 137; *Marriott vs. Brune*, 9 How. R., 419; *Maxwell vs. Griswold*, 10 How. R., 255; *Cary vs. Curtis*, 3 How. R., 236. And to the same effect are the text writers. Paley on Agency, by Lloyd, 389, 392; Story on Agency, sections 300, 301, 307; 2 Liv. on Agency, (ed. of 1818,) 260, 261. The right to recover against the principal does not, and never did, depend upon the giving of notice to the claimant. It is apparent, therefore, that the right to recover, against the collector, money paid for unascertained duties to a greater amount than was imposed by law, was not, prior to the act of 1839, restricted to the excess ascertained by the adjustment made by the collector.

The solicitor supposes that, in the case of *Lawrence vs. Caswell*, 13 How. R., 488, the Supreme Court undertook to settle the construction of the act of 1846, (9 Stat. at Large, p. 44,) and held that, where no protest is made, duties are not illegally exacted, in the legal sense of the term. This point was not discussed in the opinion of the court in the case of *Sturges, Bennet & Co. vs. The United States*, but it was noticed in the opinion of the court in the case of *Beatty's Executor vs. The United States*. We there expressed the opinion that the Supreme Court merely meant to declare that, to maintain an action against the collector, the act of 1845 requires a protest, stating specially the grounds of objection, and, in the sense of that law, there can be no illegal exaction without such a protest. Our reasons for this opinion are there given at length. We have carefully reconsidered them, and find no reason to change the views there presented. The Supreme Court is purely a judicial tribunal, and nothing could detract more from the high character which it has justly attained in the United States, or tend more to impair confidence in its decisions, than the idea that it could be induced so far to transcend its legitimate powers, in any case, as to do more than decide *the very case* submitted to it. It is true that, in presenting its views of the case decided, it may, with propriety, draw its arguments from any source, of which, in its discretion, it may approve. But no motive of public policy can be strong enough to justify or excuse that or any other court in the United States, where the executive, legislative, and judiciary departments of the federal as well as of the State governments, are most sedulously kept separate and distinct, in attempting, by a decision in one case, to lay down rules to be followed in any other case not of the same character with the one decided. In making a decision in one case, no court can rightfully undertake to do more than merely decide *that case*. Its decision, by virtue of the principle which gives value to a judicial precedent, may be followed, and, where it is the court of the last resort, in most instances ought to be followed in other cases. This is done, not because the court so orders, but by reason of the merits of the decision as a judicial precedent. It is upon this ground that the decisions of the highest courts become authoritative, and are regarded as evidences of great principles. The court is required to give its attention to the particular case before it exclu-

sively, and it is because it is presumed to have done so, that its decision attains to the dignity of a precedent. It is with no less pride than pleasure that we feel ourselves authorized to say, that no court on earth has ever manifested a more sacred regard for these principles than the Supreme Court of the United States.

The construction of the act of 1846 was in no way involved in the case of *Lawrence vs. Caswell*, and it is not to be presumed that the court had it in contemplation. It was not cited either by the bar or the court. The merits of the case could be in no respect affected by it, no matter what might be its construction.

The solicitor suggests that this court was mistaken in saying, in the case of *Beatty's Executor vs. The United States*, that prior to the act of 1845 it was not necessary to state the grounds on which the protest was made. We regarded this as a principle about which there could be no doubt, and therefore cited no authority in support of it. It will be found fully sustained by the cases which have already been cited. In the case of *Swartwout vs. Gihon*, 3 How. R., 110, the notice to the collector was merely that the duties charged would be contested. It is true that the point in that case was, whether it was necessary that the notice should be in writing; but if it was necessary to state "the grounds of objection," it was fatally defective for that reason, and it is difficult to conceive why it was not objected to, on that account, upon any other reasonable hypothesis than that it was not regarded as defective for that reason. And, moreover, the court say: "The *only* object of the notice was to *warn* the collector that the party *meant to hold him personally responsible* for the money, whether he paid it over or not." (3 How. R., 110.) And such is the doctrine of all the cases. If, then, this was the only object of the notice, for what reason could it be necessary to state "the grounds of objection?" Before the passage of the act of 1845, no case can be found where any exception was taken to the notice for the reason that it did not state "the grounds of objection." Since its passage such an exception is common. If such an exception had previously been valid, how can it be accounted for that it was never taken? We adhere to the opinion that, before the act of 1845, it was not necessary to state in a protest "the grounds of objection."

We cannot but regret that the solicitor should have understood this court to say, in the case of *Beatty's Executor vs. The United States*, that the act of 1845 was merely *declaratory*. We said: "That act was, *to some extent*, a declaratory statute;" and immediately added: "The Supreme Court, in the case of *Cary vs. Curtis*, had held that the act of 1839 took away the right of action against the collector; and the act of 1845, in substance, *declares* that it was not the intention of Congress that the act of 1839 should have that effect." We did not undertake to say that the act of 1845 was *declaratory* in any other respect. That, in our opinion, it imposed new terms upon the action against the collector, we explicitly state as follows: "As regards the action against the collector, the only essential change which the act of 1845 seems to have made, is, to require that the protest shall be 'in writing, and signed by the claimant, at or before the

payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

Whether the act of 1845 "is applicable as well to cases arising before as since its adoption," is a question which does not arise in this case, and can now be of but little, if any, practical importance. It seems to us strange, however, that the solicitor should suppose that the provisoes of the second section of the act of 1846 refer exclusively to decisions under the act of 1855. The provisoes are as follows: "*Provided*, That, before any such refunding, the Secretary shall be satisfied, by decisions of the courts of the United States upon the principle involved, that such duties were illegally exacted: *And provided, also*, That such decisions of the courts shall have been adopted or acquiesced in by the Treasury Department as its rule of construction." (9 Stat. at Large, p. 84.) This language is very broad, and indubitably embraces not only decisions under the act of 1845, but all other decisions of the courts of the United States, whether made under that act, or any other, and whether made before or after its passage. There are many reasons which will suggest themselves to every mind, why the natural meaning of the language used should be adopted in the construction of those provisoes; whilst not one, in our judgment, having any good foundation in justice, can be assigned for a more restricted meaning. The argument, therefore, urged by the solicitor against the remark made by this court, in the case of *Beatty vs. The United States*, that "the construction * * imputed to the Supreme Court, if adopted, would, in all probability, to a great extent, repeal the act of 1846," is wholly unsupported.

In the case of *Lawrence vs. Caswell*, 13 How. R., 496, the Chief Justice used this language: "The duty of 100 *per cent. ad valorem* was chargeable on the quantity of brandy actually imported, and not on the contents stated in the invoices. This over-charge was therefore illegally exacted, and the defendants in error were entitled to recover back the amount." In the opinion of this court, in the case of *Beatty vs. The United States*, it is quoted to show that the learned Chief Justice, in the language which followed, designed to explain it. It does not seem to us to be any answer to our views to say, that no one ever supposed that a suit could be maintained, after the act of 1845, against a collector, without a protest, and that the express words of that act would seem sufficient to guard against such a possibility. This but shows that the explanation was the more necessary; for without it, even according to this view, the inconsistency of the language of the Chief Justice above quoted, with the *express words* of the act of 1845, would have been glaring and palpable.

Some stress was laid on this language used by the Chief Justice in *Lawrence vs. Caswell*: "Nor are they within the principle decided in the case before us." A more obvious proposition was never asserted, and it but strengthens the views which have been expressed by this court. The obvious motive of the court was, that the actual decision made in the case should be understood. Too great care can never be bestowed on this point. What is the *principle* decided in the case of *Lawrence vs. Caswell*, as regards the matter of protest? That in cases like that, where there was an over-charge of duties,

and the duties demanded were paid under protest, stating specially the grounds of objection, in the mode required by the act of 1845, an action can be maintained against the collector. And the court are careful to exclude the conclusion, that any other case would be "within the principle decided" in that case. They had already expressed the same idea, when they said: "When we speak of duties illegally exacted, the court mean to confine the opinion to cases *like the present*, in which the duty demanded was paid under protest, stating specially the grounds of objection." By this they meant, not that there could be no case of an illegal exaction of duties, unless it was like that before them, but that their opinion was to be confined to such cases. It is as if they had said, "We do not mean to assert the general proposition that duties cannot be illegally exacted, except in cases like that now before us, nor that an action can be maintained against the collector in every case of an illegal exaction; but upon both points we *confine* our opinion to cases *like the present*, in which the duty demanded was paid under protest, stating specially the grounds of objection." And throughout the opinion, the court, with characteristic caution, clearly show that they are not to be understood as doing more than deciding the very case before them.

We have carefully reconsidered the opinion of this court in the case of *Sturges, Bennet & Co.*, in connexion with the points presented in the able argument of the solicitor, and find no reason to change it.

Let an order be made directing testimony to be taken in this case.

H. & F. W. MEYER *vs.* THE UNITED STATES.

Judge Blackford's dissenting opinion :

Suit for overpaid duties.

I dissent from the final judgment rendered in this case for the claimants.

The ground of my dissent is, that the duties sued for were paid without any objection whatever, either written or verbal. The payment was voluntary, and cannot be recovered back. See act of Congress of 1845, 5 Stat. at Large, 727; *Marriott vs. Brune*, 9 Howard, 619, 636; *Lawrence vs. Caswell*, 13 Howard, 488, 496.

The dissenting opinions heretofore delivered by me in the cases of *Sturges, Bennet & Co. vs. The United States*, *Spence & Reid vs. The United States*, *Beatty's Executor vs. The United States*, and *Wood vs. The United States*, are hereto appended, and made part of this opinion.

STURGES, BENNET & CO. *vs.* THE UNITED STATES.

The dissenting opinion was delivered by Judge Blackford.

I am obliged to dissent from the judgment of the court in this case. The petition attached to this opinion shows the grounds of the claim.

The duties sued for were collected during the years 1847, 1848, 1849, 1850, and 1851.

The petition, in my opinion, is defective, because it does not allege that any of the duties were paid *under protest*. The act of Congress of 1845, chapter 22, prohibits any suit against a collector for overpaid duties, if the payment was made without protest. That point is expressly decided by the circuit court of the United States for the Maryland district, at the April term, 1849, in *Brune vs. Marriott*. In that case, the protest was not made until *after* some of the duties were paid, and the decision was, that for such of the duties there could be no recovery. The language of the court is as follows: "The remaining question is, what duties were paid under protest, within the meaning of the act of 1845? That act requires that the protest shall be made in writing, signed by the claimant, at or before the payment of the duties, and set forth, distinctly and specifically, the grounds of objection. The protest of April 9, 1847, cannot apply to the payments previously made, and the plaintiff is not entitled to recover them. But it is sufficient to cover all subsequent payments," &c.

If there has been a protest, the suit is allowed, as the statute expressly says, in order "to ascertain and try the legality and validity of such demand and payment of duties." I consider that statute to be as applicable to a suit in this court against the government for overpaid duties, as it is to a suit for that cause in any other court against the collector. The object of both suits is the same, namely, to ascertain and try the legality and validity of the demand and payment of duties alleged to have been overpaid. If such demand and payment of duties were legal and valid, the importer cannot, in a court professing to be governed by legal principles, recover those duties, either from the collector or from the government. That appears to me to be a clear proposition. Congress has thought proper, by the law of 1845, to prescribe a certain rule for the collector and importer relative to the collection of duties; and whilst the law is in force that rule must be complied with. The rule is, that if the importer wishes to object to the amount of duty charged, the objection must be made at or before the payment of the duty. If no objection be made within the time limited by law, the demand and payment of the duty must be considered legal and valid.

It will be observed that the statute of 1845, which prohibits any suit for overpaid duties, unless there has been a sufficient protest, applies to duties of every description without exception. (5 Stat. at Large, 727.) The effect of this statute relative to the protest is clearly stated in an opinion delivered by Chief Justice Taney in 1849. His language is as follows: "The protest is not required to be made on or before the payment of what are called the estimated duties. For this payment is necessarily regulated by the invoice quantity, as well as the invoice price. The importer cannot, at that time, know whether there has been any loss by leakage; nor can he know, after it has been ascertained by the weigher and gauger, whether the collector will exact duties upon the amount stated in the invoice.

"The payment is legally made when the duties are finally deter-

mined, and the amount assessed by the collector ; and a protest before or at that time is sufficient notice, as it warns the collector, before he renders his account to the Treasury Department, that he will be held personally responsible if the portion disputed is not legally due, and that the claimant means to assert his right in a court of justice.

"The payment of the money upon the estimated duties is rather in the nature of a pledge or deposit than a payment. For it remains in the hands of the proper officer, subject to the final assessment of the duties ; and if more has been paid than is due, (which is most commonly the case,) the overplus belongs to the importer, and is returned to him." *Brune vs. Marriott*, before cited. The Supreme Court affirmed that judgment, using, as to the protest, the following language : "But where the duties had not been closed up in any cases, when the written protest in April was filed—though the preliminary payment of the estimated duties had taken place—the court justly considered the protest valid. Because, till the final adjustment, the money remains in the hands of the collector, and is not accounted for with the government, and more may be necessary to be paid by the importer." *Marriott vs. Brune*, 9 How., 619, 636.

The law is therefore settled, that under the aforesaid statute of 1845 the importer is not required to make his protest until after the weigher or gauger has made his return, and the importer has had a full opportunity to know what that return is, and for what sum he is legally chargeable. That being the law, it is clear that there can be no hardship or injustice in requiring the protest. But, on the other hand, if at any distance of time after duties have been paid without objection, and with a full opportunity of knowing the facts, the United States are to be subject to be called upon for alleged overpaid duties, there will be no end to the evils that will ensue.

The language of the Supreme Court of the United States in 1851, with respect to the question now under consideration, is as follows : "But it is proper to say, in order that the opinion of the court may not be misunderstood, that when we speak of duties illegally exacted, the court mean to confine the opinion to cases like the present, in which the duty demanded was paid under protest, stating specially the ground of objection. Where no such protest is made, the duties are not illegally exacted, in the legal sense of the term ; for the law has confided to the Secretary of the Treasury the power of deciding, in the first instance, upon the amount of duties due on the importation. And if the party acquiesces, and does not, by his protest, appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal to which the law has confided the power of deciding the question.

"Money is often paid under the decision of an inferior court, without appeal, upon the construction of a law which is afterwards, in some other case, in a higher and superior court, determined to have been an erroneous construction. But money thus paid is not illegally exacted. Nor are duties illegally exacted where they are paid under the decision of the collector, sanctioned by the Secretary of the Treasury, and without appealing from that decision to the judicial tribunals by a proper and legal protest. Nor are they within the

principle decided in the case before us." *Lawrence vs. Caswell*, 13 Howard, 488, 496. That is the unanimous opinion of the highest judicial tribunal in the United States on the precise question now before us. It is the opinion of that court on the meaning of the act of Congress of 1845, before referred to. That opinion is, that duties paid *without protest*, as the duties in the case before us were paid, are not illegally exacted. And, surely, if the duties now sued for were not illegally exacted, that is, if the collection of those duties was lawful, the claimants can have no right, in a court of justice, to recover them back, either from the collector or from the government.

My opinion is, therefore, that the petition shows no ground for relief.

SPENCE & REID, CONSIGNEE AGENTS OF MASON & TULLIS, *vs.* THE UNITED STATES.

[The petition of the claimants is hereto attached.]

Dissenting opinion, delivered by Judge Blackford:

I dissent from that part of the judgment in this case which sustains the present suit as to certain overcharged duties.

The duties in question were paid to the collector without a written protest setting forth the grounds of objection, and were afterwards paid by the collector into the treasury of the United States.

The decision of the court is, that duties paid without such protest may be recovered back by a suit in this court. That decision is, in my opinion, contrary to the act of Congress of 1845, chapter 22.

The dissenting opinions delivered by me in the cases of *Sturges, Bennet & Co. vs. The United States*, and of *Beatty vs. The United States*, are hereto attached and made part of this opinion.

Mason & Tullis, for whose use this suit is brought, sued the collector in Baltimore for overcharged duties on the same pimento mentioned in the present petition. The circuit court of the United States decided, in that case, that the suit was in substance a suit against the United States; and that "*the money was in the treasury, and must be paid from the treasury if the plaintiff recover.*" They also decided that the suit would not lie, because there was no legal protest. (*Mason & Tullis vs. Kane*, circuit court of the United States for the Maryland district, April term, 1851.) That decision is in direct opposition to the present decision of this court in substantially the same case. The consequence of the judgment in this case is as follows: A merchant sues the collector in a circuit court of the United States for overcharged duties. The effect of the suit, if successful, is to obtain from the treasury of the United States the amount of those duties. But the suit fails for *the want of a legal protest*. The same merchant then turns round and sues the United States, in the Court of Claims, for the same duties, and recovers *without such protest*. One court decides that the treasury of the United States is liable upon the same state of facts on which the other decides that the treasury is not liable. It is impossible that these contradictory decisions can both be right.

The act of 1845 prescribes the condition, upon the performance of which, and only upon such performance, a suit will lie for overpaid duties. That condition is, the making of a legal protest within the proper time. The policy of the act is very clear. It is noticed by Chief Justice Taney, in the following words: "Now, the act of February 26, 1845, in express terms, provides, that no action of this kind shall be maintained against a collector, 'unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.'"

"It is not therefore sufficient to object to the payment of any particular duty or amount of duty, and to protest in writing against it. The claimant must do more. He must set forth in his protest the grounds upon which he objects, distinctly and specifically. And these latter words are too emphatic to be regarded as mere surplusage, or to be overlooked in the construction of this law. The object of this provision is obvious. In the multitude of collection offices in the United States, and the changes which so frequently take place in the officers, mistakes and oversights will sometimes take place, and irregularities in the assessment of duties. And the object of this provision is to prevent a party from taking advantage of such objection when it is too late to correct them, and to compel him to disclose the grounds of his objection at the time when he makes his protest. The case before the court strikingly exemplifies the policy of this provision. One of the objections is, that the merchant appraisers did not actually inspect the pimento. It was not actually looked at and inspected by the appraisers, because there was no controversy about its quality. The consignees had notice and appeared before the merchant appraisers, and did not suggest that there was any defect in the quality which would lower the value, nor express a wish to have it inspected. They offered to prove that it was bought for the price at which it was invoiced, and that such was then the market price at the place where it was purchased. The appraisers were satisfied that it was bought at the price stated, but were of opinion that the price was lower than its market value in the principal markets of the island, and appraised its dutiable value accordingly.

"There is not the slightest reason to suppose that their assessment would have been, in any degree, influenced or changed by the actual inspection of the article. And if this objection had been stated in the protest, the error could have been immediately corrected before the duties were exacted; but it is now too late. And if this oversight be fatal to this appraisement, and renders it invalid, then the public lose, not only the enhanced duties to which the pimento was liable, but also the additional or penal duty which was the consequence of the merchant appraisal. The same may be said of the other grounds of objection above mentioned. If they had been set forth in the protest as the grounds of objection, and had been deemed tenable by the administrative department, the errors could have been corrected without the expense of litigation, and the duties which the law imposes secured to the public. And it is for this purpose that the act of 1845 requires the grounds of objection to be distinctly and specifically set

forth in the protest. For this suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States." (*Mason & Tullis vs. Kane*, above cited.)

That opinion shows very clearly that the said act of 1845 is founded in sound policy. But whether it be so or not, no court can repeal it. Whilst it is in force it must be obeyed.

The only argument in the present case made by the claimants that appears to me to require an answer, is, that this suit is not against the collector, but is against the United States. That argument admits of a short and conclusive answer. It is this: The law is settled by said decision of the United States court, that a suit against the collector for overcharged duties is, in truth, a suit against the United States. So that, according to that decision, which is certainly correct, the mere fact that this suit is against the United States, and not against the collector, is no reason that the suit should be sustained.

I must be permitted to repeat here, what was said by me in *Sturges, Bennet & Co. vs. The United States*, namely, that the Supreme Court of the United States has decided that duties paid without a legal protest are not illegally exacted. (*Lawrence vs. Caswell*, 13 Howard, 488, 496.)

When the claimants contend that the duties in question ought not to be retained in the treasury, they forget that those duties are so retained, not for the money involved, but in obedience to the statute of 1845, which Congress, for wise purposes, has thought proper to enact. They forget that, as regards the collection of duties on imports, Congress has the right to prescribe by law what rules it thinks proper; and that all persons who choose to import goods subject to duty, must conform to the rules which the law prescribes.

My opinion, therefore, is, that the petition shows no ground for relief.

BEATTY'S EXECUTOR *vs.* THE UNITED STATES.

Dissenting opinion, delivered by Judge Blackford:

I dissent from the judgment of the court in this case.

The petition, which is attached to this opinion, does not allege that the duties sued for were paid under protest.

The only question, therefore, which need be considered is, whether overpaid duties, paid without protest, can be recovered back by a suit in this court?

That question ought, in my opinion, to be decided in the negative.

The opinion on this subject, delivered by me a few days ago, in *Sturges and others vs. The United States*, is annexed to this opinion, and is to be considered a part of it.

The act of Congress of 1845, referred to in that opinion, after saying that nothing contained in the second section of the act of the third of March, 1839, "shall take away, or be construed to take away, or impair the right of any person or persons who have paid or shall hereafter pay money, as and for duties under protest, to any col-

lector," &c., concludes as follows: "Nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." (5 Stat. at Large, 727.) In the opinion in *Sturges and others vs. The United States*, I stated that I considered that act of 1845 to be as applicable to a suit in this court against the government for overpaid duties, as it is to a suit for that cause in any other court, against the collector. When that opinion was delivered, I was not aware that the principle just alluded to had been recognised by any of the courts; yet, as it appeared to me so perfectly clear, I did not hesitate to adopt it. But I have since found that the same doctrine, namely, that a suit against a collector for overpaid duties, is, in substance, a suit against the United States, had been expressly decided by the circuit court of the United States for the Maryland district. The following is the language of the court:

"For this suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States. The money is in the treasury, and must be paid from the treasury if the plaintiff recover. And as the United States cannot be sued and made a defendant in a court of justice without their consent, they have an undoubted right to annex to the privilege of suing them any conditions which they deem proper. And, in the exercise of this power, they have granted this privilege in the form of a suit against the collector, where duties are supposed to be overcharged, upon condition that the claimant, when he pays the money, shall give a written notice that he regards the demand as illegal, and means to contest the right of the United States in a court of justice; and stating also, at the same time, distinctly, the specific grounds upon which he objects. This is the condition upon which he is permitted to sue the collector, and thus to appeal from the administrative to the judicial department of the government. It is a condition precedent." (*Mason and Tullis vs. Kane*, MSS.)

That opinion was delivered by Chief Justice Taney, and decides that a suit against the collector for overpaid duties is, in truth and substantially, a suit against the United States. And it also decides that such a suit cannot be sustained if the duties were paid without protest.

If that decision is correct, as it undoubtedly is, it shows conclusively that the suit now before this court, which is a suit against the United States for overpaid duties, paid without protest, is forbidden by the act of 1845, and, of course, cannot be sustained.

The claimant's main argument is, that his testator's money has been unlawfully obtained by the government, and that he has therefore a right to recover it back. The fallacy of that argument consists in assuming what is not true, namely, the unlawfulness of the collection of the money. The truth is, that the money having been paid without protest, was lawfully received by the collector and by the government.

Congress, as a matter of policy, enacted the aforesaid act of 1845;

and the Supreme Court of the United States have decided, as they were bound to decide, that, according to that act, duties paid without protest are not illegally exacted. (*Lawrence vs. Caswell*, 13 Howard, 496.) The Court of Claims, like every other court, is bound by the law; and as the act of 1845 has forbidden any suit to be brought against the collector (which, it is decided, would be, in truth, a suit against the United States) for duties paid without protest, this court cannot, whilst that act is in force, sustain a suit against the government for duties so paid.

The act of 1845 fixes a reasonable time within which objections to the duties charged may be made, and says that if the objections are not made within the time, the duties shall not be recovered back. The object of that act is to secure prompt and final settlements relative to the duties, whilst the facts can be easily ascertained, and to prevent the continual disputes and frauds which would be occasioned by delay. The act appears to be founded on sound policy; but whether it is so or not is a question for the consideration, not of the courts, but of the legislature.

I am of opinion, for the above reasons, that this suit for over-paid duties, paid without protest, cannot be sustained.

DAVID WOOD vs. THE UNITED STATES.

Dissenting opinion, delivered by Blackford, J.

This is a suit for overcharged duties. The particulars of the claim will sufficiently appear from the following extract from the petition:

"Your petitioner respectfully represents, that during the years 1847, 1848, 1849, 1850, and 1851, he imported into the United States certain quantities of liquors in casks, on which importations duties were imposed and paid by him to the United States, not only on the value of the quantity of liquor, ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation, which was lost—which did not exist at the time when the duty was imposed—which was not and could be imported into the United States. Your petitioner claims a return of the moneys exacted from him as import duties on such leakage or non-imported liquors."

There is no allegation in the petition that any objection whatever was made to the payment of the said duties.

No evidence has been taken in the case; and the only question now before the court is, whether the petition shows a good cause of action. The decision of a majority of the court is, that the petition is sufficient. From that decision I dissent. The ground of my dissent is, that the duties in question were paid without objection. The dissenting opinions heretofore delivered by me in the cases of *Sturges, Bennet & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*, are referred to as a part of this opinion. In the examination of those cases, I

became entirely satisfied that the act of Congress of 1845, cited and relied on by me, was a bar to the claims ; and as I consider that act to be a bar in those cases, I, of course, consider it to be a bar in this case.

Since the judgment of the majority of the court in the present case was rendered, I have met with a decision of the district court of the United States for the eastern district of Pennsylvania, which clearly shows that, even *before the act of 1845*, overcharged duties paid without objection could not be recovered back from the United States. Such payments made without objection are what the law denominates voluntary payments ; and the law is well settled that money so paid cannot be recovered back. This principle not only applies to the present case, but is also applicable to the aforesaid cases of *Sturges, Bennet & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*. The decision of the district court of the United States, above alluded to, is as follows :

An action was brought by the United States against Clement & Newman on a custom-house bond, dated 30th of June, 1841, conditioned for the payment of \$793, that sum being part of the duties charged on an invoice of molasses imported, by the defendants, from Cuba into Philadelphia. The defendants claimed, among other things, a set-off of \$345 22, being an alleged overcharge of duties previously paid by them. Mr. Watts, the district attorney, said in his argument that though the amount claimed there was small, the principle involved the restoration of an immense sum—not only fifteen or twenty thousand dollars, before paid by those defendants, but millions to other importers throughout the United States, paid by them voluntarily and without protest. * * * * * To the second credit the defendants ask for, we reply, first, that is covered by the same objections as the other ; and, second, that the duties on which it is founded were paid voluntarily, and could not be recovered by the defendants, they having given no proof of compulsion or protest. Mr. Cadwalader, for the defendants, said : Both our claims, for credit or set-off, rest on these reasons, but the second is met by the additional objection that it was a voluntary payment without protest, and is therefore not recoverable against the United States. We reply that there is evidence of a protest to go to the jury, and that it was not a voluntary payment. It was required as a preliminary to entry, and was exacted *colore officii*, and is therefore not voluntary, and may be admitted as a set-off. The judge (27th of March, 1843) charged the jury as follows :

“ If the jury believe that the value of the sugar or molasses embraces all costs and charges at the place of exportation, including the costs of hogsheads, barrels, boxes, &c., necessary to enable the parties to export it, then it will be unnecessary further to consider the question ; should they think otherwise, then a new question arises for their consideration, and that is, where the duties on this shipment paid voluntarily and without objection, in consequence of the parties mistaking the law ; if they were so paid, they cannot be recovered back, or deducted from the claim of the United States. It has been argued

that a payment to a public officer cannot be considered as a voluntary payment, as he holds the compulsory power in his own hands. This may be so, where the party paying objects, at the time of payment, to the propriety and legality of the charge. It is not necessary there should be a formal written protest, but there must be some objection, some notice that the claim is disputed, as the ground of objection or dispute may be removed or agreed to; but if paid without such objection, merely on a mistaken construction of the law, it is binding, and cannot be recovered back, or set off against another demand. Was there any such notice or objection by the defendants at the time of payment? The only evidence on their part is that of Mr. Newman, who says there was no formal protest, but Mr. Clement informed him there was a mistake in calculating the duties, and that he (Mr. Clement) had been talking to Mr Kern about it. Mr. Kern, who was a deputy collector, is since deceased; his testimony was not taken in his lifetime, and no witness is produced who heard the conversation. On the other side, Mr. Howell, deputy collector; Mr. Martin, the cashier; Mr. Bell, the ascertaining clerk; and Mr. McAdam, the bond clerk, have all been examined, and each of them say they never heard of any complaint by the defendant; and Mr. Howell states, that if such a complaint had been made, it would have been within his peculiar duty to examine it; but he knows of none. Still, this is a question of fact for the jury, and it is their province to decide it, the burden of proof being on the defendants. If you are satisfied that a duty was charged on the boxes, or hogsheads, over and above the value of the sugar, or molasses, at the time and place of exportation, and that such excess was paid by the defendants, they at the same time protesting or complaining against the justness or legality of the demand, then they are entitled to deduct the amount of such excess from the sum claimed in this suit. If, however, you believe that no excess was charged, or, if charged, that it was paid voluntarily, and without complaint, it is binding on the defendants, and they will not be entitled to the deduction." Verdict for the plaintiffs. *United States vs. Clement and Newman*, Crabb's Reports, 499 to 515.

In the case just referred to, as before stated, the United States were the plaintiffs and Clement and Newman the defendants. The defendants claimed, as a set-off, a certain sum as having been paid for overcharged duties. The court decided in 1843, that if the duties had been paid without objection, the payment was voluntary, and could not be recovered back from the United States. That was the law, as said case decides, after the act of Congress of 1839, and before the act of 1845, relative to overcharged duties. When that decision was made, a verbal objection made at the time of payment was sufficient to enable the party to recover back from the United States, by way of set-off, overcharged duties. But by the act of 1845, no such recovery can be had, unless the objection was made in writing, and the grounds of the objection stated.

The above mentioned case of the *United States vs. Clement and Newman* was decided by a court of the United States, in which case the government of the United States was itself a party. The decision is entitled to great respect, and I cite it for the purpose of showing

that, independently of the act of 1845, there is no foundation for the present claim as described in the petition. That decision is in direct opposition to the judgment of the majority of the court in the present case.

The above are my reasons, in addition to those given in the cases of *Sturges, Bennet & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*, for my dissent, in the present case, from the judgment of the court.

H. L. THISTLE.

JULY 28, 1856. -- Committed to a Committee of the Whole House, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

H. L. THISTLE *vs.* THE UNITED STATES.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of H. L. Thistle *vs.* The United States;

1. The petition of the claimant.
2. Claimant's brief.
3. Opinion of the court, refusing an order to take testimony.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this tenth day of July, A. D. 1856.

[L. S.]

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

To the honorable John J. Gilchrist, presiding judge, and the honorable Isaac Blackford and George P. Scarborough, judges of the Court of Claims:

The petition of Hezekiah L. Thistle respectfully shows to this honorable court—

First. That your petitioner is a citizen of the United States, and now residing in the city, county, and State of New York.

Second. That your petitioner was the originator, inventor, and discoverer of certain valuable improvements in the construction of saddle-trees of dragoon and pack saddles, for riding or transmitting heavy burdens on horses and mules, which said improvements were briefly as follows: A peculiar formation and adaptation of the side bars, which, combining the concave and convex formation of the horse's back, and extending down on the arch of the horse's ribs,

gave a greater bearing than is usual in the ordinary saddle-tree, and left the vertebrae and withers free from pressure. Also a peculiar formation and adaptation of the seat of said saddle, which would relieve the pressure upon the muscles of the rider's legs, as existing in the ordinary saddle, and thus preventing the ruptures which they (the ordinary saddles) caused.

Your petitioner shows, that he was the originator, discoverer, and inventor of the method and process of conforming and shaping said bars as aforesaid, and of fitting and conforming the foundation of the rider's seat as aforesaid. The entire details, specifications of which were furnished to the Commissioner of Patents, as hereinafter mentioned.

Third. Your petitioner further shows, that on or about the fifth day of January, A. D. 1847, he filed in the office of the United States Commissioner of Patents, in Washington, the requisite petition, affidavit and specifications, drawings and models, according to the statutes in such case made and provided, claiming the issue of letters patent for his said above-mentioned invention, discovery, and improvement; and that on the said day he paid the fees and charges required by law to be paid upon filing applications for letters patent, and received the treasurer's certificate therefor; whereby the United States government became bound to investigate and pass upon your petitioner's said application for letters patent, according to law, and the regulations of the Patent Office. That said application for letters patent, together with the said petition, affidavit, specifications, drawings, and model, were afterwards, and before the 26th day of May of the said year, to wit, A. D. 1847, with some slight modifications in the said specifications, reported to the examining officer of the Patent Office, and that thereupon your petitioner's application for the said letters patent took its place on the files of the Patent Office to be acted upon in its turn. And your petitioner prays, that said petition, affidavit, specifications, drawings, model, &c., be considered as part of this petition, and that he may refer to them as such.

Fourth. Your petitioner further shows, that after the said 23d day of May, and before his said application for letters patent had been reached in its turn, to wit, on or about the 12th day of November, A. D. 1847, one Thornton Grimsley filed in the office of the Commissioner of Patents an application for letters patent, together with the requisite petition, affidavit, specifications, drawings, and model, claiming in his petition to be the originator, inventor, and discoverer of certain valuable improvements in a dragoon and pack saddle; that said Grimsley's said petition, affidavit, specifications, drawings, and models, (to which your petitioner hereby prays to refer, and make a part of this his petition,) embraced and embodied the greater part of your petitioner's discovery and invention, as set forth in his said application for letters patent; and that said Grimsley's said application for patenting a dragoon and pack saddle covered the same grounds and embraced the same claims which were set forth in your petitioner's said application; and your petitioner alleges and shows, that the said Grimsley was not the first inventor, originator, or dis-

coverer of his said alleged and pretended improvements in a dragoon and pack saddle.

Fifth. Your petitioner further shows, that the then Commissioner of Patents did not give your said petitioner notice of the said conflicting claim and application for letters patent, as required by the 8th and 12th sections of the United States patent laws, passed July 4th, 1836, and the acts amendatory thereof.

Sixth. Your petitioner further shows, that afterwards, and on the 3d day of December, A. D. 1847, and before his said application for letters patent had been reached and acted upon in its turn, an official letter or note was sent by the Honorable William L. Marcy, the then Secretary of War, to the Honorable Edmund Burke, the then Commissioner of Patents, of which the following is a copy, to wit:

“WASHINGTON, December 3.

“SIR: It is represented that the early issue of a patent to Mr. Grimsley, for his invention of a dragoon-saddle, will facilitate a supply for the government. I therefore take the liberty to urge that it may be issued to him as soon as practicable.

“Yours, truly,
“W. L. MARCY.

“Hon. E. BURKE,
“Commissioner of Patents.”

Your petitioner further sets forth, in the same connexion, the said Commissioner's endorsement upon said official letter or note to the “Examiner” in the Patent Office, of which the following is a copy, to wit:

“DECEMBER 4, 1847.

“As the interests of the government will be promoted by an early examination of Mr. Grimsley's application, as appears by the statement of the Secretary of War within, the case may be taken up and acted upon forthwith.

“This note should be filed with the other papers.
“EDMUND BURKE.”

Which said official letter or note, and its said endorsement, are now on file in the office of the Commissioner of Patents, and your petitioner prays that he may be allowed to refer to them, and make them a part of this his petition.

Your petitioner represents and shows, that thereupon said Grimsley's said application for letters patent was taken up by the said Examiner before its turn, there being at that time many other applications on file in the Patent Office, including your petitioner's aforesaid application, which, according to the statute and the rules of the Patent Office, should have been acted upon before said Grimsley's said application; and that upon his the said Examiner's report, the Commissioner of Patents caused the said Grimsley's petition to be granted, and on the 11th day of December, A. D. 1847, within thirty days after the filing of said Grimsley's application, the said Commissioner of Patents

caused to be issued out of his said office letters patent to the said Grimsley for his said pretended discovery and invention of an improved dragoon and pack saddle; and your petitioner shows that said letters patent were issued contrary to statute and the rules and regulations of the said Patent Office; and that your petitioner's aforesaid application still remains in the Patent Office on file, not acted upon, and postponed.

Seventh. Your petitioner, therefore, represents and claims, that by reason of the premises aforesaid, he has been unjustly and illegally deprived of, and injured, as to his rights and property by the action of the United States government, through its officers and agents, and that he has been prevented from, and deprived of, the enjoyment of his said invention and discovery, and that by reason of the said premises he has been prevented from enjoying, and deprived of the smallest pecuniary results from his said discovery, origination, and invention. Your petitioner also shows, that all his preliminary steps and proceedings in making his said application for letters patent were perfectly formal, correct, and pursuant to the statute in such case made and provided. And your petitioner further shows, that his said origination, invention, and discovery, if it had been properly secured to him by letters patent, would have been worth to him at least the sum of one hundred thousand dollars; and therefore claims, that, by reason of the said premises, he has sustained and suffered damage and loss at the hands of the United States government in the sum of one hundred thousand dollars.

Eighth. Your petitioner shows, that during the 30th session of the United States Congress, and during the winter of 1847 and 1848, your petitioner memorialized Congress of and concerning the aforesaid infringements and violation of your petitioner's rights, and that his said memorial and petition was referred to the Committee on Patents to investigate and report upon the same. That said committee decided that the subject-matter of the said petition did not come within the powers and jurisdiction of Congress, and so deciding, refused to investigate and take testimony in the matter, but decided and held that your petitioner's only remedy was an action at law against the then Commissioner of Patents for mal-practice. Your petitioner also shows that no subsequent action has been taken by Congress, or your petitioner, upon this his said claim, up to the time of filing this his said petition.

Wherefore your petitioner prays the adjudication and order of this your honorable court in his behalf, and that such relief may be granted and decreed to your petitioner in the premises as shall seem meet to the court.

Dated November 8, 1855.

GEO. D. KELLOGG,
Attorney for the Petitioner, 25 Nassau Street, N. Y.

STATE OF NEW YORK, }
City and county of New York, } ss.

Hezekiah L. Thistle, the said petitioner, being duly sworn, says, that he has heard and read the foregoing petition, and knows the

contents thereof, and the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

H. L. THISTLE.

Sworn to before me, this 13th day of November, 1855.

STRATFORD H. BAILEY,
Com'r of Court of Claims for State of New York.

U. S. COURT OF CLAIMS.

In the matter of the claim of	} Petitioner's brief.
HEZEKIAH L. THISTLE	
against	
THE UNITED STATES GOVERNMENT.	

The claimant conceives himself to be entitled to present his claim, and asks for the favorable decision of this court, under each and every class of jurisdiction specified in the act of Congress establishing this court, (see act to establish Court of Claims, passed February 24, 1855, sec. 1st,) on these grounds:

First Point.—"Congress shall have power, &c., to promote the progress of science and useful arts by securing, for limited terms, to authors and inventors the exclusive right to their respective writings and discoveries, and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."*

Congress has exercised that power by passing laws from time to time entitled "Acts to promote the progress of the useful arts."† Of which laws, the acts of 1836, 1839, and 1842 were in full force at the time of the petitioner's application for letters patent.‡

Second Point.—These acts prescribe the duties to be performed by the United States, acting through or by its officers, agents, and the "heads of department," as well as the duties of those applying for letters patent.

The sixth and ninth sections of the Patent Laws of 1836 specify what should be done by the applicant, which was done in this case.§ And the United States, by receiving the fees prescribed by the ninth section of the said Patent Laws, did impliedly, if not expressly, contract to perform the duties which the government had imposed upon itself by virtue of the seventh and eighth sections of the said act of 1836.||

Third Point.—The government, by its officers of the Patent office, did enter upon its duties in this case, as prescribed by the seventh section of said act;¶ an examination was made, and the application was placed upon the files of the Patent Office to be acted upon in its turn.**

* Constitution of the United States, article 1, section 8.

† Patent Laws from the year 1790 to 1842.

‡ Petition, third clause.

§ Petition, third clause.

|| Curtiss on Patents, pages 637 and 638.

¶ Patent Law of 1836, section 7.

** Petition, third clause.

It then became the duty of the Commissioner to issue letters patent therefor; if any objection had been found upon such examination, then it was the duty of the Commissioner acting for the government to have notified the applicant,* so that all things directed to be done on the part of the applicant, or the Commissioner of Patents, might be done; but no such notice was given to the applicant, and therefore his right to such patent was established.

Fourth Point.—The United States, through its officers and heads of departments, violated the eighth section of the Patent Laws of 1836, and their contract with the applicant, in not notifying this claimant that Thornton Grimsley's application for letters patent interfered with the then pending application of this petitioner. And the government also violated the whole spirit of the Patent Laws, the regulations of the Patent Office, and the contract with this petitioner, in issuing letters patent to Grimsley for improvements in a dragoon and pack saddle, of which he was not the first inventor; while the claimant's application was waiting its turn, upon the files of the Patent Office, for letters patent.

Fifth Point.—It cannot be necessary to add argument to establish the principle that the United States are equitably and legally liable for all violations of its laws by its own officers, especially those connected with the Executive departments, the same as individuals or corporations.

Prior to the passage of the act establishing this court, there was no way in which a claim could be enforced against the United States, and therefore parties were compelled to sue the officers of government as individuals, alleging malpractice, or to petition Congress.

This opinion is now exploded. This court has decided, in the case of Isaac Swain,† that the government is liable for injury sustained by citizens in consequence of the improper conduct of its agents.

The superior court of the city of New York, after an elaborate argument before its full bench of six judges, decided that the New York and New Haven Railroad Company were liable in damages for the false and fraudulent certificates of stock given by Robert Schuyler, its transfer agent.‡ (The decision is not yet reported, but soon will be in the 3d volume of Duer's Reports.) The supreme court of the State of New York has also made a similar decision.§ The above decisions answer the view that was taken by the committee of Congress when petitioned by the claimant.||

Sixth Point.—The fact that the Commissioner of Patents violated the law and injured the claimant, at the instigation of the head of another department,¶ is an additional reason why this claim should be allowed. Admitting that the reason given was the true reason, with all the justification claimed, yet the claimant had a property in his invention which the law recognised, and no private property could

* Patent Laws of 1836, sections 8 and 12.

† Decision of United States Court of Claims, made in case of Isaac Swain, on or about October 29, 1855.

‡ Decided on or about June 23, 1855.

§ 1 Abbot's Practice Reports, (N. Y.,) 417.

¶ Petition, ninth clause.

¶ Petition, sixth clause.

be taken constitutionally for public use, either directly or indirectly, without compensating the owner,* and the government is both liable and able to make such compensation.

GEO. D. KELLOGG,
Attorney for Petitioner, 25 Nassau street, N. Y.
A. THOMPSON, *Of Counsel.*

HEZEKIAH L. THISTLE vs. THE UNITED STATES.

The opinion of the court was delivered by SCARBOROUGH, J.

The petitioner alleges that he was "the originator, inventor, and discoverer of certain valuable improvements," specified in his petition "in the construction of saddle-trees of dragoon and pack-saddles, for riding or transmitting heavy burdens on horses and mules."

On or about the 5th day of January, A. D. 1847, he filed in the office of the Commissioner of Patents "the requisite petition, affidavit, and specifications, drawings and models, according to the statutes in such case made and provided, claiming the issue of letters patent for his said above mentioned invention, discovery, and improvement," and then paid the fees and charges required by law, and received the treasurer's certificate therefor.

The application for letters patent, together with the petition, affidavit, specifications, drawings and model were afterwards, and before the 26th day of May, A. D. 1847, with some slight modifications in the specifications, reported to the examining officer of the Patent Office, and thereupon the petitioner's application for letters patent took its place on the files of the Patent Office, to be acted upon in its turn.

On or about the 12th day of November, A. D. 1847, before the petitioner's application for letters patent had been reached in its turn, Thornton Grimsley filed in the office of the Commissioner of Patents an application for letters patent, together with the requisite petition, affidavit, specifications, drawings, and model, claiming in his petition to be the originator, inventor, and discoverer of certain valuable improvements in a dragoon and pack saddle. Grimsley's petition, affidavit, specifications, drawings, and models embraced and embodied the greater part of the petitioner's discovery and invention, as set forth in his application for letters patent; and Grimsley's application for patenting a dragoon and pack saddle covered the same grounds and embraced the same claims which were set forth in the petitioner's application; but Grimsley was not the first inventor, originator, or discoverer of his alleged and pretended improvements in a dragoon and pack saddle.

The "then Commissioner of Patents did not give" the "petitioner notice of the said conflicting claim and application for letters patent, as required by the eighth and twelfth sections of the United States patent laws passed July 4th, 1836, and the act amendatory thereof."

* Constitution of the United States, article 5, and 2d volume of Kent's Commentaries, pages 392 to 397, and cases there cited.

On the 3d day of December, A. D. 1847, before the petitioner's application for letters patent had been reached and acted upon in its turn, "an official letter or note was sent by the Hon. William L. Marcy, the then Secretary of War, to the Hon. Edmund Burke, the then Commissioner of Patents, of which the following is a copy, to wit :

" WASHINGTON, December 3.

" SIR : It is represented that the early issue of a patent to Mr. Grimsley, for his invention of a dragoon saddle, will facilitate a supply for the government. I therefore take the liberty to urge that it may be issued to him as soon as practicable.

" Yours, truly, W. L. MARCY.

" Hon. E. BURKE,
" *Commissioner of Patents.*"

The Commissioner made the following "endorsement upon said official letter or note to the 'examiner' in the Patent Office :

"As the interests of the government will be promoted by an early examination of Mr. Grimsley's application, as appears by the statement of the Secretary of War within, the case may be taken up and acted upon forthwith.

"This note should be filed with the other papers.

" EDMUND BURKE.

" December 14, 1847."

Thereupon Grimsley's application for letters patent was taken up by the examiner before its turn, and upon his report the Commissioner of Patents caused Grimsley's petition to be granted, and on the 11th day of December, A. D. 1847, within thirty days after filing his petition, the Commissioner of Patents caused to be issued out of his office letters patent to Grimsley for his pretended discovery and invention of an improved dragoon and pack-saddle. The "said letters were issued contrary to statute and regulations of the said Patent Office," and the petitioner's application still remains in the Patent Office, on file, not acted upon, and postponed.

The petitioner, during the winter of 1847-'8, memorialized Congress, and the Committee on Patents made a report unfavorable to his claim. He now insists that his "said origination, invention, and discovery, if it had been properly secured to him by letters patent, would have been worth to him at least the sum of one hundred thousand dollars," and he claims this sum against the United States.

Such is the petitioner's case, as it is stated in his petition. If any wrong has been done him, it was not committed by the United States, or any officer of theirs, under such circumstances as render them pecuniarily responsible to the petitioner. Taking, as we must at this stage of the case, the allegations of the petitioner to be true, the most that he has shown is, that he has been injured by the misconduct in office of the Commissioner of Patents. But the United States are not ordinarily responsible for either the malfeasance or non-feasance in office of a public officer ; and it does not seem to us that this case constitutes an exception to the general rule. We are, therefore, of the opinion that the petitioner is not entitled to relief. No order will be made directing testimony to be taken in this case.

ISAAC SWAIN.

[To accompany Bill C. C. 23.]

AUGUST 1, 1856.—The Court of Claims submitted the following report.

ISAAC SWAIN, *vs.* THE UNITED STATES.

To the honorable Senate and House of Representatives of the United States in Congress assembled.

The Court of Claims respectfully presents the following documents as the report in the case of Isaac Swain, *vs.* The United States.

1. The petition of the claimant.
2. Opinion of the court on the petition.
3. Depositions and other documents exhibited as evidence before the court, transmitted to the House.
4. Other documents referred by the House of Representatives to the court, and returned to that House in a separate envelope.
5. Claimant's brief on the facts.
6. Opinion of the court on the facts.
7. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this first day of August,
[L. s.] A. D. 1856.

SAMUEL H. HUNTINGTON,
Chief Clerk Court of Claims.

IN THE UNITED STATES COURT OF CLAIMS.

DISTRICT OF COLUMBIA, COUNTY OF WASHINGTON.

To the honorable the Judges of the Court of Claims:

The petition of Isaac Swain, a resident citizen of the State of California, and the city of San Francisco, respectfully sheweth unto your honors, that the government of the United States is justly indebted to him in the sum of thirty-seven thousand seven hundred and twenty-nine dollars and forty-nine cents.

Your petitioner was the master and owner of the ship Ellen Brooks, to wit, in the year 1851, then sailing in the waters of the Pacific ocean. On the 10th day of April, in the year 1851, while his vessel was lying in the port of Valparaiso, your petitioner entered into a

charter-party with one Joshua Waddington, as the agent of Major R. B. Lee, U. S. A., chief and supervising commissary of subsistence to the Pacific division of the army, for the transportation of certain military stores and supplies from Valparaiso to Benicia, for the sum of four thousand dollars; which charter-party is in words and figures as follows, to wit:

Charter-party.

"It is this day mutually agreed between Isaac Swain, master of the good American ship *Ellen Brooks*, of ———, of the burden of ——— tons per register, or thereabouts, now lying *now lying* in the port of Valparaiso, of the one part, and Mr. Joshua Waddington, of Valparaiso, merchant, as agent of Major Lee, of the other part. That the said ship being tight, staunch, and strong, and her decks and sides properly caulked, and every way fit for the voyage, shall take in, upon the terms hereinafter mentioned, a quantity of cargo, as per note at foot, and being so loaded, shall therewith proceed direct to Benicia, Upper California, and deliver the same from ship's tackles, at the expense of the ship charterers, agreeably to the bill of lading, and so end the voyage, (restraint of princes and rulers,) the danger of the seas and navigation, fire, pirates and enemies during the voyage, always excepted. For discharging said cargo, ten working days are to be allowed the said merchants, if the ship be not sooner discharged, and from the day she is ready to discharge or unload at Benicia until finally discharged; time occupied in sailing from port to port not counted as working days. The master is to give notice in writing when he is ready to deliver cargo. The freight to be paid, as under, four thousand dollars in full; the captain to sign bills of lading without reference to rate of freight, and without prejudice to this charter-party. The ship to find necessary dunnage and mats to keep the cargo clean. The owners to be liable for any damage arising from side lights or ports. Penalty for non-performance of this charter-party, \$4,000.

"The cargo to comprise more or less the following:

4,000 quintals of flour,
500 bushels beans,
500 " potatoes,
500 " onions,
500 pumpkins,
3,000 pounds dried peaches.

"The master obliges himself to have the potatoes, onions, and pumpkins overhauled and examined whenever the weather will permit, and at the same time have places apart for any that may have got bruised or damaged.

"The vessel to leave this port before the 30th April, A. D. 1851.

ISAAC SWAIN,
JOSHUA WADDINGTON.

"Witnesses—CHARLES BROWN,
THOMAS JONES.

"VALPARAISO, April 10, 1851."

This charter-party is endorsed as follows :

"I certify that I received a notice that the ship *Ellen Brooks* was ready to discharge cargo on the 9th of July, and that the said ship did not commence discharging until the 17th July, on account of the refusal of the collector of the port of Benicia to allow the commissary stores on board be landed until duties were paid, or secured in the same manner as on private property. The collector's permit reached the vessel at one o'clock, p. m.

GEORGE PIERCE ANDREWS,
Brevet Major U. S. A., A. C. S."

"I certify that the within charter-party has been complied with, excepting the non-delivery of eight quintals of flour, valued at \$40 33, which is to be deducted from the amount of freight when paid, and is due the subsistence department, and that the discharge of the cargo was completed this 28th day July, 1851.

GEORGE PIERCE ANDREWS,
Brevet Major U. S. A., A. C. S."

—
"BENICIA, CALIFORNIA, *October 16, 1851.*

"I certify, that so far as the subsistence department is concerned, the within charter has been fully complied with, the flour above mentioned having been paid for.

GEORGE PIERCE ANDREWS,
Brevet Major U. S. A., A. C. S."

Your petitioner would represent, that in compliance with the obligation contained in the foregoing charter-party, he proceeded with his ship *Ellen Brooks* and her cargo to the port of Benicia, in California, where he anchored at the ship's tackles on the 8th day of July, 1851, and notified in writing Bt. Major George Pierce Andrews, then in command of the subsistence department at Benicia, of his readiness to discharge cargo, and thus complying on his part with the stipulations of the charter-party entered into as above mentioned.

Your petitioner would further represent, that the agents of the United States government failed to comply with the said stipulations, and that the government is fairly chargeable with a non-performance of the charter-party, in this: that the said officers refused to receive said cargo from the ship's anchorage, at the port of Benicia, and required your petitioner to proceed to the government landing or hulk, a distance of about five miles beyond the "end of the voyage," as provided for in said charter-party.—(See papers filed, A, B, C, and D.)

Your petitioner would beg leave here to introduce the following, from Major General Wool, as explanatory of his whole case:

"HEADQUARTERS, DEPARTMENT OF THE PACIFIC,
San Francisco April 11, 1854.

"SIR: In reference to your claim on the government of the United States, I would remark, that from the report of Major Allen, assistant quartermaster, to the Secretary of War, dated 25th May, 1852, the report of Major Cross to these headquarters, dated April 1, 1854, and

the several statements, numbering from one to fourteen, which you submitted for my examination, it appears that the ship *Ellen Brooks* was chartered the 10th day of April, 1851, by an agent of the United States commissary of subsistence, to transport subsistence stores on account of the United States from Valparaiso to Benicia, in California. It appears, also, that the captain of the ship *complied with charter, when he arrived at Benicia* the 8th day of July, 1851, but the assistant quartermaster nor the assistant commissary of subsistence *would not receive the stores*, unless landed at the public wharf, which was not, at the time, within the limits of the town of Benicia. The captain of the ship, however, *complied with the orders of the assistant commissary, and proceeded to the landing of the depot of the post, just beyond the boundary of Benicia*, by which the vessel became *seriously injured*. It likewise appears, that after the ship occupied the position designated by the commissary of subsistence, the captain *was prevented eight days from landing the stores*, by the collector of the port, he refusing to give a permit to land them until the payment of duties on the government cargo. The commissary of subsistence remonstrated against the payment, and the question was referred to the collector of San Francisco, and, consequently, eight days were consumed in the reference, for which delay you claim damage.

"From all the facts and circumstances of the case, it seems to me you have *just and equitable claims* for damages on the government of the United States. I think, however, you claim much more than you are entitled to. The damages which your ship sustained by going to the port wharf, and the *damages consequent to the detention of the ship and cargo* by the collector of the port, *I think ought to be allowed*; beyond this I have no data by which I can arrive at a just conclusion in regard to the residue of your claims.

"I am, very respectfully, your obedient servant,

"JOHN. E. WOOL,

"Major General.

"Captain ISAAC SWAIN,

"San Francisco, California."

Your petitioner would also refer to the following *official* letter from Major Cross, quartermaster United States army, to Major E. D. Townsend, assistant adjutant general of the Pacific division:

"CHIEF QUARTERMASTER'S OFFICE, DEPARTMENT OF THE PACIFIC,
San Francisco, April 1, 1855.

"MAJOR: In obedience to the instructions of the major general commanding, I have examined the *charter-party* and papers relative to the ship *Ellen Brooks*, which was chartered in Valparaiso on the 10th of April, 1851, by Mr. Joshua Waddington, merchant of that place, and agent for *Major Lee*, commissary, to transport commissary stores from that port to Benicia, and have the honor to report my opinion:

"1st. The captain of the ship *Ellen Brooks* complied with her charter when he reached the *port of Benicia*, and it was not binding on him to deliver the stores at any other place but at the port of Benicia, unless it had been so expressed.

"2d. The vessel was detained by the collector not allowing her to land her stores, as requested by the captain.

3d. Orders were given by the assistant commissary for her to proceed to the landing of the depot of the post of Benicia, and not by orders of the assistant quartermaster, where she sustained *damages as set forth by the several affidavits*; where, by complying with those instructions, she not only became *injured*, but, in point of law, vitiated her insurance.

"I therefore consider, that under these circumstances, so far as the amount of charges are made for fitting the vessel for sea, it is a just and equitable claim. As to the damages sustained otherwise, it is not my province to decide, and can only be regulated by Congress.

"In closing my views on the subject, I will here state, that it was a matter with which the quartermaster's department had nothing to do.

"The contract was made by the agent of another department, and the only duty to be performed was to transport the stores to the storehouse after being landed.

"Therefore, while the owners of said vessel have a *just demand* on the government for the repairs of said vessel, it is not a proper charge against the quartermaster's department, but more properly against the subsistence department, under whose instructions the vessel seems to have been directed.

"Very respectfully, sir, your obedient servant,

"O. CROSS,

"Major and Quartermaster.

"Major E. D. TOWNSEND,

"Asst. Adjt. General, Hd. Qr. Dept. Pacific, San Francisco."

Thus your honorable court will perceive that your petitioner was not only required to proceed five miles beyond the "end of his voyage" to deliver his cargo, but by so doing he vitiated his insurance, and therefore he claims that the government of the United States is justly indebted to him in the sum of \$4,000, it being the amount of penalty for a non-performance of the charter party.

But your petitioner would further represent unto your honorable court, that the government of the United States is indebted to him in the further sum of \$1,250, it being five dollars per ton for the transportation of two hundred and fifty tons of freight from the port of Benicia to the government landing, a distance of five miles.—(See papers filed, E, F, and G.)

Again, your petitioner would represent, that by reason of having to discharge his freight at the government landing or hulk, his said ship, the Ellen Brooks, became seriously damaged, to wit, to the amount of \$3,550, as is fully shown by the annexed certificates, which last mentioned sum is also justly due your petitioner from the government of the United States.—(See papers filed, H, I, J, K, L, and M.)

After your petitioner had drawn his vessel up to the government hulk, which he did under protest, (see Appendix M,) due notice was again given to the proper officer of the readiness of your petitioner to discharge his cargo, when a controversy arose between the several gov-

ernment officers at the port of Benicia relative to the payment of duties on the government stores. The following *official* statement from Major R. B. Lee, United States army, and commissary of subsistence to the Pacific division, will explain to your honorable court the result of this controversy between the collector of the post of Benicia and the army officers in command at the post, and the heavy losses which were consequently sustained by your petitioner :

Statement of Major R. B. Lee.

“ WASHINGTON, December 24, 1854.

“ In the year 1851 I was chief and supervising commissary of subsistence to the Pacific division of the army.

“ On reaching San Francisco from a tour of service on the 15th of July, 1851, it was reported to me by Major Eaton, commissary of that station, that the ship *Ellen Brooks* had arrived at Benicia on the 9th inst., partly laden with army supplies from Chile, and that the collector of customs held the ship in custody for the payment of duties upon the army supplies, which neither himself nor the commissary at Benicia felt authorized to pay.

“ Without loss of time I proceeded to Benicia, remonstrated with the collector against the legality of the charge, and demanded the army supplies, which he persisted in refusing to surrender unless the duties were paid ; the case was then referred to Commanding General Hitchcock, who considered he had no authority to interfere.

“ The ship was then at the government landing, a custom-house officer in charge, the hatches closed and sealed, and the cargo evidently in a state of fermentation.

“ To avoid the total destruction of the cargo, consisting of a large supply of flour and beans, besides the vegetables, I tendered the collector a draft on the Commissary General of Subsistence, conditional and subject to the proper head of department, for the amount of duties claimed ; this was declined by the collector, but after two days' delay and consultation with collector King at San Francisco, accepted, and the army supplies released.

“ Upon removing the custom-house seals and hatches, the upper cargo, consisting of vegetables and dried fruits, presented a shocking spectacle of decay and fermentation, the bags containing onions and potatoes were dripping wet, and had become so rotten that many of them fell to pieces in the act of hoisting, dense clouds of putrid steam escaped from the hold, and the vegetables turned out almost a total loss.

“ Any similar cargo on private account must have shared the same fate, and the loss justly attributable to the detention of the ship ten or twelve days with closed hatches.

“ R. B. LEE,

“ Commissary of Subsistence Major U. S. Army.

“ P. S.—The draft when presented was cancelled by the Secretary of the Treasury, and the act of the collector pronounced illegal.”

(See also paper filed, N.)

Your petitioner would further represent unto your honorable court, that in consequence of this action on the part of the officers of the United States government, acting in their official capacity, the residue of your petitioner's cargo was greatly damaged, to wit, to the amount of \$6,704 49, as is shown by the following certificate from the clerk, and under the seal of the United States district court:

UNITED STATES OF AMERICA, NORTHERN DISTRICT OF CALIFORNIA.

RAPHAEL ORREGO et al.,
vs.
 SHIP ELLEN BROOKS. }

I hereby certify that the following named persons, libellants and interveners in this suit, were awarded the amounts respectively placed opposite to their names by the commissioner to whom was referred to report thereon the amounts due:

Raphael Orrego	-	-	-	-	\$866 00
James Duncan	-	-	-	-	1,400 70
Wm. Jolliffe	-	-	-	-	256 00
Wm. F. Clark	-	-	-	-	3,538 86
					6,060 86
And costs	-	-	-	-	643 63
					6,704 49

In witness whereof, &c.

JOHN A. MONROE, *Clerk.*

For which said amount of damages your petitioner's vessel was condemned and sold in the port of San Francisco, to wit, on the 6th day of September, A. D. 1851, whereby the government of the United States became justly liable to your petitioner for the amount of damages accruing as aforesaid.

And your petitioner would further represent, that his said vessel, the ship Ellen Brooks, in consequence of the official conduct of the officers of the United States, and the libelling and selling of said vessel to pay the damages as aforesaid, became a total loss to your petitioner, whereby the United States became equitably liable to your petitioner for the value of said ship, to wit, for the sum of \$10,000, (the cost of said vessel in October, 1850.)

Your petitioner would also represent that, as a direct consequence of the action of the officers at the port of Benicia, he was required to expend in the defence of suit against libellants the further sum of \$225, which last mentioned sum your petitioner claims is also justly due him from the government of the United States.

Again, your petitioner represents unto your honors, that he was despoiled of his property as before stated, and thrown out of employment at a very heavy pecuniary loss, to wit, to the amount of \$12,000, this being less than the amount of interest due on the cost of ship and the amount due for transportation of damaged cargo, saying nothing

about the loss of time, expense, and total derangement of petitioner's business, which would justly amount to a sum twice as large; therefore your petitioner claims as damages for interest, loss of time, expense, and derangement of business for four years, the further sum of \$12,000, as justly due him from the United States, making the total claimed by your petitioner the sum of thirty-seven thousand seven hundred and twenty-nine dollars and forty-nine cents, as follows, to wit:

For forfeiture of charter-party	-	-	-	-	-	\$4,000 00
For transporting 250 tons freight to government post	-	-	-	-	-	1,250 00
For damage sustained to ship in proceeding by order of U. S. officers beyond charter contract	-	-	-	-	-	3,550 00
For damages to cargo as per award of the U. S. district court	-	-	-	-	-	6,704 49
For expenses in defending suit	-	-	-	-	-	\$225 00
For cost of vessel in October, 1850	-	-	-	-	-	10,000 00
For damages in interest, loss of time, &c., &c.,	-	-	-	-	-	12,000 00
						37,729 49

Petitioner would further state, his said claim upon the government of the United States was presented to the Senate of United States on the 23d day of December, 1853, and referred to the Committee of Claims. Said committee reported the following bill, which was passed by the Senate on the 13th December, 1854:

A BILL for the relief of Isaac Swain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War be authorized and directed to cause to be paid to Isaac Swain, out of any money in the treasury not otherwise appropriated, the sum of four thousand one hundred and fifty dollars, for damages and detention of the ship "Ellen Brooks," the property of said Swain, while employed in conveying military supplies from the port of Benicia to the government post near that place, by order of the proper officers, and the detention of the vessel beyond the time stipulated in the charter-party.

(See the printed report No. 333.)

The bill, as passed by the Senate, was referred to the Committee on Claims in the House of Representatives, and reported without amendment Feb'y 2, 1855—but too late for final action by that body. Petitioner would also beg leave to state that he is the original, present, and only party interested in the claim.

Wherefore petitioner prays your honorable court, that a bill may be framed and presented to Congress for its adoption, granting to him the said sum of \$37,729 49, in full liquidation of his claim as above set forth; and as in duty bound he will ever pray, &c.

ALEXANDER H. EVANS

Attorney for claimant.

STATE OF NEW YORK, }
City of New York. } ss.

Personally appeared before the undersigned authority, Captain Isaac Swain, of California, who after being duly sworn makes oath and says, that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

ISAAC SWAIN.

Subscribed and sworn to this twenty-first day of May, A. D. 1855.

WM. SINCLAIR,
Comm'r of Deeds.

STATE OF NEW YORK, }
City and County of New York. } ss.

I, Richard B. Connolly, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, being a court of record, do hereby certify, that William Sinclair, before whom the annexed deposition was taken, was, at the time of taking the same, a commissioner of deeds for said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed [L. s.] the seal of the said court and county, the 21st day of May, 1855.

RICH'D B. CONNOLLY, *Clerk.*

ISAAC SWAIN vs. UNITED STATES.

Opinion of the court delivered by SCARBURGH, J.

The petitioner was the master and owner of the ship *Ellen Brooks*, and on the 10th day of April, A. D. 1851, entered into a charter-party with Major R. B. Lee, U. S. A., chief and supervising commissary of subsistence to the Pacific division of the army, for the transportation of military stores from Valparaiso to Benicia, for the sum of four thousand dollars.

The charter-party is set forth in the petition. The petitioner alleges that it was fully performed by him.

On the ship's arrival at Benicia, the officers of the government of the United States refused to receive the cargo there, and required the petitioner to proceed to the "government landing or hulk," five miles beyond the "end of voyage." This he did, but under protest.

The collector of customs seized the ship and held her "in custody for the payment of duties upon the army supplies." She was ready to discharge her cargo on the 9th, but a permit was not obtained from the collector till the 17th, and the delivery was completed on the 28th day of July, A. D. 1851.

Whilst the ship was in the custody of the collector the hatches were closed and sealed.

In consequence of the action of the government officers, the residue of the petitioner's cargo was damaged to the amount of \$6,704 49 ; and his ship was condemned and sold therefor at San Francisco ; and thereby his ship became a total loss to him.

He claims not only the \$6,704 49, but also \$10,000 for the value of the ship.

The petitioner claims \$225 expended by him in the defence of the suit in which the decree for the sale of his ship was made.

He also claims " as damages for interest, loss of time, expense and derangement of business for four years," \$12,000.

The bill of particulars is as follows :

For forfeiture of charter-party.....	\$4,000 00
For transporting 250 tons freight to government post.....	1,220 00
For damage sustained to ship in proceeding by order of United States officers beyond charter-contract.....	3,550 00
For damage to cargo, as per award U. S. district court.....	6,704 49
For expenses in defending suit.....	225 00
For cost of vessel in October, 1850.....	10,000 00
For damages in interest, loss of time, &c., &c.....	12,000 00
	37,729 49

This is a case depending entirely upon contract, and it does not appear to this court that the facts set forth in the petition of the claimant do not furnish any ground for relief. Let an order be made authorizing the taking of testimony in this case.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

On this 18th day of October, A. D. 1855, personally appeared before me, a commissioner appointed by the Court of Claims to take testimony, Phinehas Hudson, who being duly sworn according to law to tell the truth, the whole truth, and nothing but the truth relative to the claim of Isaac Swain against the United States, does, upon his oath testify, that his name is Phinehas Hudson ; that he is a shipwright ; that he is fifty-two years old ; that he, for the past year, resided in San Francisco, though he has been to New York within the year, and came out around Cape Horn ; that he has no interest either direct or indirect in this claim of Captain Isaac Swain against the United States ; and that he is not related to the claimant in any degree.

Question 1. Did you survey the ship Ellen Brooks in the year 1851, to ascertain the damage she had received by being on the rocks at Benicia ; and if you did, please state your report and estimate of repairs ?

Answer. I made a survey on the ship Ellen Brooks, of Boston, Isaac

Swain, master, some time in August, 1851. I learned from Captain Swain that she had been on the rocks at Benicia with a full cargo on board, which he feared had strained his ship, and caused great damage to her copper. On examination of the ship I found the upper rudder-joint broken, the starboard main channel carried away, the main rail and plankshire splintered; and reported to Captain Swain that it was necessary to heave his ship out to ascertain the full damage done. But to repair the damage then in sight, and to heave her out and sight both sides, would cost three thousand five hundred and fifty dollars; and, further, that all repairs which her bottom might require from being in contact with the rocks would be an additional expense, the amount of which I could not tell until I had seen it.

Question 2. What, in your opinion, would have been the value of the ship *Ellen Brooks*, had the damages she sustained on the rocks at Benicia been thoroughly repaired and the ship put in sea order?

Answer. From my recollection of the ship she was well built and a large carrier for her tonnage, capable of carrying about nine hundred tons; and I believe that if the damages which she sustained by being on the rocks at Benicia had been repaired she would have been a valuable ship, worth, in my opinion, twelve thousand dollars.

Question 3. Is the bill here shown you a correct bill of survey—for your services, I mean? [Note.—The bill is attached at the end of deposition.]

Answer. Yes, sir, it is perfectly correct, I believe.

Question 4. Do you know any other matter relative to the claim in question; if you do state it?

Answer. I do not know anything else.

PHINEHAS HUDSON.

Phinehas Hudson reappeared on the 22d day of October, 1855, by consent of parties, and Gwyn Page, esq., appeared for the government; and the following addition was made to the foregoing deposition by request of Phinehas Hudson:

"I would further state, that no amount of repairs could, in my opinion, make the ship as valuable after she had been on the rocks as she was before. When a ship has once been upon rocks and strained, it is, in my opinion, impossible to make her as good as she was before."

PHINEHAS HUDSON.

Captain Isaac Swain to Phinehas Hudson and Addison Plummer, Dr.

To services in surveying the ship *Ellen Brooks* in August, 1851, and reporting thereon - - - - - \$30 00

Received payment.

PHINEHAS HUDSON.

SAN FRANCISCO, *August*, 1851.

STATE OF CALIFORNIA, }
 County of San Francisco. } ss.

On the 18th and 22d days of October, A. D. 1855, personally came Phinehas Hudson, the witness above named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the above deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Phinehas Hudson, taken at the request of Isaac Swain, to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of Isaac Swain. The adverse party was notified, and Gwyn Page, esq., at the request of the solicitor, represented the government, did attend and did not object.

TULLY R. WISE,
 Commissioner.

Fees of witness	-	-	-	-	-	-	-	\$3 00
Travel.								
Attendance.								
Commissioner's fees	-	-	-	-	-	-	-	13 10

IN THE COURT OF CLAIMS.

On the petition of Isaac Swain, the undersigned agree to take testimony on the part of the above named petitioner, without notice as required by the rules of the court, before Tully R. Wise, commissioner for said court, in the city of San Francisco, California. The solicitor of the United States designates Gwyn Page, esq., resident in San Francisco, to attend the taking of said depositions, and represent the United States, and said claimant, when he is ready to proceed with the taking of his depositions, shall give said attorney notice thereof.

M. BLAIR,
 Solicitor United States.

A. H. EVANS,
 Attorney for petitioner.

WASHINGTON, September 15, 1855.

STATE OF CALIFORNIA, }
 City and County of San Francisco. } ss.

On this 18th day of October, A. D., 1855, personally appeared before me, a commissioner appointed by the Court of Claims, Annis Merrill, who being duly sworn to tell the truth, the whole truth, and nothing but the truth relative to the claim of Isaac Swain against the United States of America, does upon his oath testify, that his name is Annis Merrill; that he is an attorney-at-law; that he is forty-four years old; that he has resided for the past year in the city of San Francisco, in the State of California; that he has no interest direct or

indirect, in the claim of Isaac Swain against the United States of America, and that he is not related to Isaac Swain in any degree.

Question 1. Did you defend the ship *Ellen Brooks* in the suit of Orrego and others against her?

Answer. I did. I think it was in 1851.

Question 2. What did you charge for your services in defending the suit against the ship *Ellen Brooks*?

Answer. My charge was two hundred and twenty-five dollars.

Question 3. Did Captain Isaac Swain settle your bill for services rendered him?

Answer. He paid me.

Question 4. Do you know any other matter relative to the claim in question? If so, state it.

Answer. I have a general recollection of the nature of the suit. It was a suit for damages in consequence of injury to fruit, I think, and other cargo, occasioned by the detention of the ship at Benicia; and, also, on account of the falling in price of certain goods while the ship was on the voyage from Valparaiso to this port. Orrego and others, recovered judgment in their suit, and the ship was condemned and sold by the marshal to pay that judgment. This is my recollection now. I do not recollect anything else. I do recollect that the case lingered along a long time, and there was considerable correspondence between Captain Isaac Swain and the officers at Benicia about the detention of the ship.

ANNIS MERRILL.

Gwyn Page, esq., attorney-at-law, appeared for the United States, at the request of the solicitor, and said he did not wish to ask any question.

STATE OF CALIFORNIA, }
County of San Francisco. } ss.

On this 18th day of October, A. D. 1855, personally came Annis Merrill, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Annis Merrill, taken at the request of Isaac Swain, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Isaac Swain. The adverse party agreed to taking the depositions; did attend and was represented by Gwyn Page, esq., at the request of the solicitor, and did not object.

TULLY R. WISE, *Commissioner.*

Fees of witness	-	-	-	-	-	\$1 50
Travel.						
Attendance.						
Commissioner's fees	-	-	-	-	-	6 82

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

On this 18th day of October, A. D. 1855, personally appeared before me, a commissioner appointed by the Court of Claims to take testimony, Daniel F. Wright, who being duly sworn according to law to tell the truth, the whole truth, and nothing but the truth relative to the claim of Isaac Swain against the United States, does upon his oath testify: that his name is Daniel F. Wright; that he is a seaman; that he is twenty-one years old; that he has resided the past year in San Francisco; that he has no interest, either direct or indirect, in the claim of Isaac Swain against the United States; that he is not related to Captain Isaac Swain in any degree, but that Captain Swain married his aunt.

Question 1. Were you attached to the ship *Ellen Brooks* in the years 1850 and 1851? If you were, state what voyage, if any, was made, and if any repairs were made on the ship during said voyage.

Answer. I joined the ship *Ellen Brooks* as seaman in October, 1850, and sailed with claimant for Valparaiso. We arrived at Valparaiso in February, 1851—remained there till May following. At Valparaiso heavy repairs were made on the ship, after which we took on board a full cargo of flour, barley, and other merchandise, and sailed about the 10th of May for California, and arrived at the port of Benicia on or about the 8th of July, 1851.

Question 2. Was the ship *Ellen Brooks* in as good order and condition when she arrived at Benicia in 1851, as she was when she left this port in 1850; and if so, state why?

Answer. The ship *Ellen Brooks* was in much better order and condition when she arrived at Benicia in 1851, than she was when she left this port in 1850; because she had new wales at Valparaiso; her breast hooks and head knees rebolted; the ship was thoroughly caulked from her copper to gunwales, and her rigging put in complete order, at an expense of over two thousand dollars, as shown by these bills of her repairs, marked Nos. 1 and 2, which I offer to corroborate my statements.

(NOTE.—The papers called bills of repairs are annexed.—T. R. W.)

Question 3. Was any portion of the cargo of the *Ellen Brooks* discharged at Benicia? If it was not, state why it was not.

Answer. No portion of her cargo was discharged at Benicia, because the government agent to whom the cargo was consigned would not receive it at Benicia.

Question 4. Did the ship *Ellen Brooks* proceed with her cargo beyond the port of Benicia? If she did, to what place, under whose authority, and for what purpose?

Answer. The ship *Ellen Brooks* proceeded up the river to the government hulk at Navy Point, in charge of Captain Wilcox, an officer in the United States quartermaster's department, and placed alongside of said hulk, for the convenience of government to receive our cargo of army stores, as well as to avoid its transportation in open boats.

Question 5. Did the ship *Ellen Brooks* and her cargo receive any

damage after she arrived at the hulk at Navy Point, and if damaged, from what cause?

Answer. On the night of July 9th, as the ship *Ellen Brooks* lay beside the government hulk, the tide receded and left the ship upon the rocks with all her cargo on board; she remained in that position twenty days before relieved by the agents of government. A considerable portion of the cargo was also of a perishable nature, and was totally destroyed by the closing of ship's hatches by order of the custom-house officer, for the non-payment of duties on army stores.

Question 6. Was the cargo of the ship *Ellen Brooks* in good order and condition when she arrived at Benicia?

Answer. It was, to the best of my knowledge.

Question 7. Do you know the distance from the tackles of the ship *Ellen Brooks*, as she laid in the harbor of Benicia, to the hulk at Navy Point?

Answer. I do not know the exact distance, but believe it to be not far from five miles.

Question 8. Do you know what pecuniary losses, if any, were suffered by the claimant in the loss of his ship, and being thereby thrown out of employment?

Answer. I do not know, but believe it to have been great, as the claimant was sole owner of the *Ellen Brooks*, and she was a large and valuable ship, capable of earning to her owners a net profit of one thousand to fifteen hundred dollars a month, instead of which the claimant lost his ship, was thrown out of employment, and his business destroyed.

Question 9. Do you know the value of the freight in damaged cargo of ship *Ellen Brooks*? What disposition was made of said damaged cargo; and what number of damaged packages of merchandise of said cargo?

Answer. I do not know the value of freight on damaged cargo, as no account or admeasurement was taken of it, the consignees refused to take it away, and it was all thrown overboard, number of packages unknown to me, but believe there were five hundred or more.

Question 10. Was the amount of army stores described in these bills of lading, marked 1 and 2, received on board of the ship *Ellen Brooks*, at Valparaiso, for the United States government, and what was the number of tons taken on board; also, if delivered, and in what condition?

(NOTE.—The bills of lading are annexed.—T. R. W.)

Answer. I believe that all the army stores described in the bills of lading, marked 1 and 2, were taken on board of the ship *Ellen Brooks*, at Valparaiso, in April, 1851, for account of the United States government, and that there were two hundred and seventy-one tons, as specified in the memorandum attached to said bills of lading, marked 3, and said supplies were all delivered in good order, except the vegetables, to the army agent in California.

Question 11. In what space of time could the army stores have been discharged from the ship *Ellen Brooks* had they been received as fast as her crew would have discharged them.

Answer. About two days and a half.

Question 12. How long was the ship unnecessarily detained at Navy Point?

Answer. About seventeen days.

Question 13. In your opinion, would any damage have occurred to cargo if the ship *Ellen Brooks* had been discharged immediately upon her arrival?

Answer. I don't think there would, sir.

Question 14. Do you know of any other matter relative to the claim in question; if you do, state it.

Answer. I do not.

DANIEL F. WRIGHT.

On this 24th day of October, 1855, personally reappeared before me, by consent of parties, Daniel F. Wright, to whom the following question was propounded by the claimant:

Question. Do you know how long Captain Isaac Swain was out of employment, after he lost his ship, and why he could not get employment?

Answer. He was out of employment till May, 1852, and by losing his vessel he had no funds to purchase another vessel.

DANIEL F. WRIGHT.

STATE OF CALIFORNIA, }
County of San Francisco. } ss.

On the 18th and 24th days of October, A. D. 1855, personally came Daniel F. Wright, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner, in the presence of the witness, who then subscribed the deposition, in the presence of the commissioner. The deposition of Daniel F. Wright, taken at the request of Isaac Swain, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Isaac Swain, Gwyn Page, esq., at the request of the solicitor, represented the United States, and was not present on the 18th, but was present on the 24th, and having made the witness repeat to him the substance of his testimony, said he was satisfied, and did not object.

TULLY R. WISE,
Commissioner.

Fees of witness, two days	-	-	-	-	\$3 00
Travel.					
Attendance.					
Commissioner's fees	-	-	-	-	16 26

Shipped in good order, and well conditioned, by Joshua Waddington, on board the American ship called the *Ellen Brooks*, whereof I. Swain

is master, now riding at anchor in the port of Valparaiso, and bound for Benicia direct: To say, three thousand five hundred and ninety bags of flour, weighing one quintal each, and eight hundred and twenty, weighing fifty pounds each; two hundred and twenty-eight bags of potatoes, weighing 30,500 pounds; two hundred and fifty bags of beans, weighing 49,612 pounds, and five hundred pumpkins, being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the aforesaid port of Benicia, (the dangers of the seas only excepted) unto the commissary of subsistence on duty at Benicia, or to assigns, he or they paying freight for the said goods at the rate of as per charter-party, with primage and average accustomed.

In witness whereof, the master or purser of the said vessel hath affirmed to six bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void. Dated in Valparaiso, this 25th day of April, 1851.

ISAAC SWAIN.

Not accountable for any damage that may arise to the potatoes or pumpkins. Weight and contents unknown.

3,590 bags of	100 pounds each.
820 barrels	50 " "
228 "	30,500 " "
250 "	49,612 " "
500 pumpkins.	
5,388	packages.

Shipped in good order, and well conditioned, by Joshua Waddington, on board the American ship called the Ellen Brooks, whereof I. Swain is master, now riding at anchor in the port of Valparaiso, and bound for Benicia: To say, one hundred and one bags containing twenty-five thousand five hundred onions, and sixty-eight barrels, containing sixteen thousand, being marked and numbered as in the margin, and are to be delivered in the like order and good condition at the aforesaid port of Benicia, (the dangers of the seas only excepted) unto the commissary of subsistence on duty, or to assigns, he or they paying freight for the said goods at the rate of as per charter-party, with primage and average accustomed.

In witness whereof, the master or purser of the said vessel hath affirmed to six bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void. Dated in Valparaiso, this 7th day of May, 1851.

ISAAC SWAIN.

Not accountable for damage. Contents unknown.

101 bags containing	25,500
48 barrels "	12,000
20 " "	4,000
	41,500 onions.

Memorandum of the cargo of army stores taken on board of the ship *Ellen Brooks*, per account of the United States government at Valparaiso, in April, 1851, to be delivered at Benicia, California, to wit:

3,590 bags = 100-pound sacks of flour	-	-	359,000	pounds.
820 bags = 50 " " " "	-	-	41,000	"
228 sacks of potatoes	-	-	30,500	"
250 sacks of beans	-	-	49,612	"

480,112 "

Equal to	-	-	-	-	-	240	tons.
169 sacks and barrels of onions, 8 barrels one ton, is	-	-	-	-	-	21	"
500 pumpkins were considered equal to	-	-	-	-	-	10	"

Making a total of - - - - - 271 "
 Taken on board the ship *Ellen Brooks*, per account of government.
 ISAAC SWAIN.

Correct.

DANIEL F. WRIGHT.

VALPARAISO, 1851.

American ship Ellen Brooks and owners,

		To JOHN MASON,	Dr.		
				Dolls. Rea's.	Dolls. Rea's.
1851.					
Feb'y	7.—191 lbs. oakum, at \$8 per 100	-	-	15	2
	8.—165 lbs. oakum, at \$8 per 100	-	-	13	1½
	2 oak boards, 1 in., at \$1 4 reals	-	-	3	
	5 lbs. nails, at 1 real	-	-		5
	34 days' labor, at \$3	-	-	102	
	33½ days' labor, at \$2 4 reals	-	-	50	6
	11½ days' labor, at \$1 4 reals	-	-	17	5
	2 days' use boat, at \$1 4 reals	-	-	3	
	2 days' use 22 stages, at 2 reals	-	-	11	
	1 day's use 3 pitch kettles, at 1 real	-	-		3
	1 day man attending pitch, at \$1	-	-	1	
					217 1½
11.—	12 planks, oak, 24×10×5 feet; 100 feet=1,200 feet, at 1 real	-	-	150	
	18 lbs. nails, at 1 real	-	-		2 2
12.—	8 pitch mops, at 1 real	-	-		1
	1 plank, oak, 24×10×5, 100 feet, at 1 real	-	-	12	4
	6 pieces of oak for wedges, at 1 real	-	-		6
13.—	42 treenails, at 1 real	-	-	5	2
	30 lbs. 4 and 10-in. spike nails, at 1 real	-	-	3	6
	4 pitch mops, at 1 real	-	-		4
	4 lbs. nails, at 1 real	-	-		4

		<i>Dolls. Reals.</i>	<i>Dolls. Reals.</i>
Feb. 14.—	24 treenails, at 1 real - - -	3	
	10 feet oak for wedges, at 1 real -	1	2
	31 lbs. 8 and 10-in. spike nails, at 1 real -	3	7
15.—	58 lbs. oakum, at \$8 per 100 - -	4	5
	36 lbs. 10-inch spike nails, at 1 real -	4	4
	24 treenails, at 1 real - - -	3	
	13 lbs. spikes, at 1 real - - -	1	5
	58 lbs. oakum, at \$8 per 100 - -	4	5
	96½ days' labor, at \$3 - - -	290	2
	85½ days' labor, at \$2 4 reals - -	214	3
	19½ days' labor, at \$1 4 reals - -	28	7
	6 days' use 14 stages, at 2 reals -	21	
	6 days' use boat, at \$1 4 reals -	9	
	6 days' use 2 pitch kettles, at 1 real -	1	4
	6 days man attending pitch, at \$1 -	6	
			774
17.—	1½ barrels pitch, at \$7 - - -	8	6
	1 cuarton - - - - -	1	
	3 lbs. spike nails, at 1 real - -	3	
19.—	1 plank, oak, 12×10×5 feet, 50 feet, at 1 real - - - - -	6	2
	1 piece oak, 14×8×8 feet, 75 feet, at 1 real - - - - -	9	3
	58 lbs. oakum, at \$8 per 100 - -	4	5
	4 lbs. 9-in. spikes at 1 real - -	4	
	10 feet oak plank, 2-in., at 1 real -	1	2
	6 pitch mops, at 1 real - - -	6	
	20 feet pine, at ½ real - - -	1	2
20.—	2 planks, oak, 24×10×2 feet, 80 feet, at 1 real - - - - -	10	
	116 lbs. oakum, at \$8 per 100 - -	9	2
22.—	4 pitch mops, at 1 real - - -	4	
	5 lbs. nails, at 1 real - - -	5	
	2 pieces oak, 24 feet, at 1 real - -	3	
	1½ barrels pitch, at \$7 - - -	8	6
	75½ days' labor, at \$3 - - -	226	4
	68 days' labor, at \$2 4 reals - -	170	
	12 days' labor, at \$1 4 reals - -	18	
	6 days' use 14 stages, at 2 reals -	21	
	6 days' use boat, at \$1 4 reals -	9	
	6 days' use 2 pitch kettles, at 1 real -	1	4
	6 days man attending pitch, at \$1 -	6	
			518 2
24.—	3 pitch mops, at 1 real - - -	3	
25.—	58 lbs. oakum, at \$8 per 100 - -	4	5
	13½ days' labor, at \$3 - - -	41	2
	11 days' labor, at \$2 4 reals - -	27	4
	2 days' use boat, at \$1 4 reals - -	3	
	½ barrel pitch, at \$7 - - -	1	6

			<i>Dolls. Reals. Dolls. Reals</i>
Feb. 25.—2 days' use 1 pitch kettle, at 1 real	-	2	
2 days man attending pitch, at \$1	-	2	
			80 6
March 1.—17½ days' labor, at \$3	-	52 4	
10½ days' labor, at \$2 4 reals	-	26 2	
5 days' labor, at \$1 4 reals	-	7 4	
			86 2
			<u>1,676 3½</u>

VALPARAISO, 1851.

American ship Ellen Brooks and owners,

TO GEORGE NOWELL,

DR.

			<i>Dolls. Rs.</i>
February 7.—To 8 bolts	-	30 lbs., at 2 reals,	7 4
6 bolts dript	-	do.	9 0
8.— 4 bolts, ring and screw	-	do.	12 0
10 bolts	-	do.	14 6
11.— 4 bolts	-	do.	6 4
13.— 17 bolts and rings	-	do.	38 2
15.— 47 bolts and rings	-	do.	97 0
17.— 7 bolts	-	do.	13 4
18.— 6 bolts and 1 ring bolt	-	do.	13 2
Strapping 2 blocks			1 0
10 bolts	-	do.	10 0
19.— 15 bolts	-	do.	21 2
10 bolts and rings	-	do.	9 2
14 bolts	-	do.	14 2
20.— 8 bolts	-	do.	6 0
6 bolts and rings	-	do.	14 0
22.— 12 bolts	-	do.	16 0
12 bolts and rings	-	do.	27 4
5 bolts	-	do.	14 2
24.— 6 lbs. rings	-		1 0
5 staples	-		1 5
14 bolts	-	do.	19 4
25.— 2 bolts	-	do.	6 0
1 bolt and ring	-	do.	2 6
4 lbs. rings			6
4 bolts	-	do.	8 0
28.— 1 bolt	-	do.	2 0
			<u>386 7</u>

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

On this 18th day of October, A. D. 1855, personally appeared before me, a commissioner appointed by the Court of Claims, to take testimony, George C. Smith, who being duly sworn to tell the truth, the whole truth, and nothing but the truth relative to the claim of Isaac Swain against the United States, does upon his oath testify : that his name is George C. Smith ; that he is a merchant, a ship chandler ; that he is twenty-nine years old ; that he has resided for the past year in the city of San Francisco ; that he has no interest, direct or indirect, in the claim of Isaac Swain against the United States ; and that he is not related to Captain Isaac Swain in any degree.

Question 1. Are you acquainted with the signatures of Caleb A. Smith, John E. Smith, Martin C. Hale, and J. J. Panches ?

Answer. I am.

Question 2. Are either of the above named individuals in California ?

Answer. They are not.

Question 3. Are the signatures to this bill of sale of the ship Ellen Brooks the signatures of John E. Smith, Caleb A. Smith, Martin C. Hale, and J. J. Panches ? [Note. The bill alluded to is annexed.—T. R. W.]

Answer. They are, without any doubt.

Question 4. Have you any knowledge that Caleb A. Smith, John E. Smith, and Martin C. Hale conveyed their interest in the ship Ellen Brooks to the claimant ?

Answer. I was not a witness to the conveyance, but Caleb A. Smith, and John E. Smith were my brothers, and they told me that they had conveyed all their interest which they had in the ship Ellen Brooks to the claimant.

Question 5. Have you any other knowledge relative to the claim in question ? If you have state it.

Answer. I have not.

GEORGE C. SMITH.

STATE OF CALIFORNIA. }
County of San Francisco. } ss.

On this 18th day of October, A. D. 1855, personally came George C. Smith, the witness within named, and after having been first sworn to tell the truth, the whole truth and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness ; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of George C. Smith, taken at the request of Isaac Swain, to be used in the investigation of a claim against the United States now pending in the Court of Claims in the name of Isaac Swain. The adverse party was notified, did not attend, and did not object. The government was represented by Gwyn

Page esq., at the request of the solicitor, and he afterwards read over the deposition and said he did not object.

TULLY R. WISE,
Commissioner.

Fees of witness	-	-	-	-	-	\$1 50
Travel -	-	-	-	-	-	
Attendance	-	-	-	-	-	
Commissioner's fees	-	-	-	-	-	7 02

To all whom this present bill of sale shall come, greeting:

Know ye that we, Caleb A. Smith, John E. Smith, and Martin C. Hale, of the city of San Francisco, State of California, merchants, for and in consideration of the sum of six thousand dollars, to us in hand paid, before the signing, and sealing, and delivering of these presents by Isaac Swain, of Massachusetts the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents, do grant, sell, and convey unto the said Isaac Swain all the three-fourths part of the hull or body of the ship *Ellen Brooks*, of Boston, together with the three-fourths part of all and singular her masts, spars, sails, rigging, cables, anchors, boats, &c., &c., and also the three-fourths part of all the earnings of said ship from and after the tenth day of May last past, and now due as she lies at the port of Benicia. The certificate of whose registry is as follows: Temporary, (No. 323,) number three hundred and twenty-three.

In pursuance of an act of the Congress of the United States of America, entitled an act concerning the registry and recording of ships and vessels, Isaac Swain, two-eighths, having taken or subscribed the oath required by the said act, and having sworn that he, together with John E. Smith, three-eighths, of the State of Massachusetts, and Caleb A. Smith, three-eighths, of New York, are the only owners of the ship or vessel called the *Ellen Brooks*, of Boston, whereof Isaac Swain is at present master, and is a citizen of the United States as he hath sworn, and that the said ship or vessel was built at Medford, State of Massachusetts in the year 1834, as per register number five hundred and twenty-five, issued at Boston, December 4, 1849; now cancelled; property changed.

TOWNSEND HAINES,
Register.

And said register having certified that the said ship or vessel has two decks, and three masts, and that her length is one hundred and thirty-seven feet four inches, her breadth is twenty-seven feet, her depth is thirteen feet six inches, and that she measures four hundred and sixty-four and seventy-six ninety-fifths tons; that she is a ship, has a square stern, and a billet head; and that the said Isaac Swain having agreed to the description and admeasurement above specified, and sufficient security having been given according to said act, the said ship has been duly registered at the port of San Francisco. Given under my hand and seal at the port of San Francisco, this

28th day of October, in the year one thousand eight hundred and fifty-one.

J. COLLIER, *Collector*.

To have and to hold the said three-fourths part of said ship, and appurtenances unto the said Isaac Swain, his heirs, executors, administrators or assigns, to his and their proper use, benefit, and behoof forever; and we, the said Caleb A. Smith, John E. Smith, and Martin C. Hale, do avouch to be the true and lawful owners of the three-fourths part of said ship and her appurtenances in manner as aforesaid, and we do hereby covenant and agree to warrant and defend the said three-fourths part of said ship, and her appurtenances unto the said Isaac Swain, his heirs, administrators or assigns, against the lawful claims and demands of all persons whatever.

In witness whereof, we have hereunto set our hands and seals this eighth day of July, in the year of our Lord one thousand eight hundred and fifty-one.

CALEB A. SMITH.

JOHN E. SMITH.

MARTIN C. HALE.

[SEAL.]

[SEAL.]

[SEAL.]

Signed, sealed, and delivered in presence of me.

J. J. PUNCHES.

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

On this 19th day of October, A. D. 1855, personally appeared before me, a commissioner appointed by the Court of Claims to take testimony, F. W. Macondray, who being first duly sworn to tell the truth, the whole truth, and nothing but the truth relative to the claim of Isaac Swain against the United States, does, upon his oath, testify, that he is named F. W. Macondray; that he is a commission merchant; that he is fifty-two years old; that he has resided in the city of San Francisco for the past year; that he has no interest, either direct or indirect, in the claim of Isaac Swain against the United States; that he is not related to the claimant in any degree.

Question 1. Is the bill shown to you a correct bill of the ship Ellen Brooks—for the payment of her, I mean? [Note.—The bill is attached to the outside.]

Answer. It is; and I have the dates on which it was paid.

Question 2. Did you, or your house, offer me a charter to Maulmain?

Answer. I think it probable that I did, as we were offering charters to a great many vessels; but I do not recollect positively.

Question 3. Do you recollect any other matter relative to the claim in question? If you do, state it.

Answer. I do not know anything else.

F. W. MACONDRAY.

STATE OF CALIFORNIA, }
 County of San Francisco } ss.

On this 19th day of October, A. D. 1855, personally came F. W. Macondray, the witness within named; and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within depositions were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of F. W. Macondray, taken at the request of Isaac Swain, to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of Isaac Swain.

The adverse party was notified, did not attend, but afterwards read the deposition, and said he did not object. Gwyn Page represented the United States.

TULLY R. WISE,
 Commissioner.

Witness fees	-	.	-	-	-	-	-	\$1 50
Travel.								
Attendance.								
Commissioner's fees	-	-	-	-	-	-	-	6 23

SAN FRANCISCO, October 3, 1850.

Captain ISAAC SWAIN:

Bought of MACONDRAY & Co.

The ship "*Ellen Brooks*," of Boston,

For \$9,000.

Received payment.

MACONDRAY & CO.

STATE OF CALIFORNIA, }
 City and County of San Francisco. } ss.

On this 22d day of October A. D. 1855, personally appeared before me, a commissioner, appointed by the Court of Claims to take testimony, M. B. Cox, who being duly sworn according to law, to tell the truth, the whole truth, and nothing but the truth relative to the claim of Isaac Swain against the United States, does upon his oath testify: that his name is M. B. Cox; that he is a lighter man; that he is thirty-six years old; that for the past six years he has resided in San Francisco; that he has no interest, either direct or indirect, in the claim of Captain Isaac Swain against the United States; and that he is not related to Captain Swain in any degree whatever.

Question 1. Are you acquainted with the western harbor of Benicia?

Answer. Yes, sir.

Question 2. Is the western harbor of Benicia the usual place of anchorage for vessels bound to that city?

Answer. Yes, sir; to the best of my knowledge and belief it is.

Question 3. Do you know the distance from the western harbor of Benicia to the government hulk at Navy Point?

Answer. I should suppose between four and a half and five miles.

Question 4. Did you perform any lightering at Benicia in 1850 and 1851, and what distance?

Answer. I lightered between four and five hundred tons for the ship *Sea Queen*, from one to three miles.

Question 5. What compensation did you receive?

Answer. I received four dollars a ton by special agreement; lightering in the city of San Francisco was four dollars a ton by weight, and five dollars a ton by measurement.

Question 6. What was a fair compensation for lightering from the western harbor of Benicia to the government hulk at Navy Point?

Answer. I should say not less than five dollars a ton.

Question 7. Do you know any other matter relative to the claim in question? If you do, state it.

Answer. I know nothing else.

M. B. COX.

STATE OF CALIFORNIA, }
County of San Francisco. } ss.

On this 22d day of October, A. D. 1855, personally came, M. B. Cox, the above named witness, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the foregoing deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner, in the presence of the witness, who then subscribed the deposition, in the presence of the commissioner. The deposition of M. B. Cox, taken at the request of Isaac Swain, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Isaac Swain. The adverse party was notified, and did attend, and did not object. Gwyn Page, esq., represented the United States by request of the solicitor.

TULLY R. WISE,
Commissioner.

Fees of witness	-	-	-	-	-	\$1 50
Travel.						
Attendance.						
Commissioner's fees	-	-	-	-	-	7 02

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

On this 18th day of October, A. D. 1855, personally appeared before me, a commissioner appointed by the Court of Claims to take testimony,

B. B. Williams, who being duly sworn to tell the truth, the whole truth, and nothing but the truth, relative to the claim of Isaac Swain against the United States of America, does upon his oath testify: that his name is B. B. Williams; that he was formerly a shipmaster, and is now a ship-broker; that he is fifty-five years old; that he has resided in the city of San Francisco for the past year; that he has no interest whatever, either directly or indirectly, in the claim of Isaac Swain against the United States; that he is not related to Isaac Swain in any degree.

Question 1. Did you know the ship *Ellen Brooks*, of Boston, before and after she got upon the rocks above Benicia, in 1851? If you did, please state all the particulars respecting said ship, her character, and final end.

Answer. I knew the ship *Ellen Brooks* well. Saw her when building; have known her ever since. She was a ship of the first class, built at Medford, in the State of Massachusetts, of the best materials, and superior workmanship. Saw her in Boston before, and in San Francisco after she was on the rocks above Benicia. I only know she was on the rocks from hearsay. I was at the marshal's sale in September, 1851, and knew she sold for less than half her value before her accident, or what she cost in 1850. After her sale by the marshal she left this port (without undergoing the necessary repairs) for the Sandwich Islands. There she took in a cargo of oil, and sailed for New Bedford; a few days out from the islands she was found too leaky to proceed on her voyage, and she bore away for Tahiti, where she arrived in a sinking condition, having, as report said, eleven feet water in her hold; after discharging her cargo she was found to have been so badly strained by being on the rocks above Benicia that she was pronounced unseaworthy, and was there condemned.

I was connected with the ship that was sent from San Francisco to Tahiti to take the cargo of oil that had been shipped upon the *Ellen Brooks*, and that she was unable to carry. The ship sent out to take this cargo was the *Java*. This is the way I became knowing to the facts.

Question 2. How long have you been in California, and what was your occupation previous to coming here?

Answer. I have been here since 1850; previous to that I was a shipmaster; I have been a shipmaster for thirty years and upwards.

Question 3. Do you know the compensation for first class shipmasters in San Francisco, in 1851?

Answer. I do. It was from two to three hundred dollars a month. To command such a ship as the *Ellen Brooks*, I suppose two hundred and fifty dollars a month would not have been high; I suppose about fair.

Question 4. In your opinion, what was the actual damage sustained by Captain Isaac Swain as master and owner of the ship *Ellen Brooks* by her being on the rocks above Benicia, and being subsequently sold by the United States marshal, for damage to cargo, occasioned thereby, which threw him out of employment?

Answer. I believe that the damage to Captain Isaac Swain was loss of time for one year, at two hundred and fifty dollars per month,

making three thousand dollars ; that the value of the ship, the Ellen Brooks, when she arrived at Benicia, in 1851, was not less than ten thousand dollars, and had the ship Ellen Brooks not have suffered the great damage which she did, by being on the rocks above Benicia, that Captain Swain would have chartered his ship to the East Indies, and from thence to an Atlantic port, a voyage of ten months, at fifteen hundred dollars per month, which was a loss of fifteen thousand dollars, making an actual loss to Captain Swain, as master and owner of the ship Ellen Brooks, of twenty-eight thousand dollars.

Question 5. Do you know any other matter relative to the claim of Captain Isaac Swain against the United States? If you do, state it.

Answer. I know nothing whatever except what I have stated.

B. B. WILLIAMS.

B. B. Williams recalled by consent of parties.

Questions propounded by Gwyn Page, who appeared for the government, by request of the solicitor.

Question 1. What was the value of the ship Ellen Brooks at the time she was sold by the marshal?

Answer. When she was sold by the marshal was after the accident, and I would not give three thousand dollars for her. She did sell, however, for more than that; my recollection is, that she sold for thirty-five hundred dollars; I bid thirty-one hundred and fifty dollars, I think, but after I heard what accident had happened to her I stopped bidding. It was stated to me at the time that she had been on the rocks.

B. B. WILLIAMS.

STATE OF CALIFORNIA, }
County of San Francisco. } ss.

On the 18th and 22d days of October, A. D. 1855, personally came, B. B. Williams, the witness named above, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the above deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner, in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of B. B. Williams, taken at the request of Isaac Swain, to be used in the investigation of a claim against the United States, now pending in the Court of Claims, in the name of Isaac Swain. The adverse party was notified, did attend, and did not object. Gwyn Page, esq., by request of the solicitor, represented the United States.

TULLY R. WISE,
Commissioner.

Fees of witness	-	-	-	-	-	\$3 00
Travel.						
Attendance.						
Commissioner's fees	-	-	-	-	-	13 49

IN ADMIRALTY.

To the judge of the district court of the United States for the northern district of California:

Raphael Orrego, Marcos Orrego, and Antonio Orrego, doing business as merchants in the city of San Francisco, State of California, under the firm and style of "Orrego Brothers," exhibit this, their libel, in a cause of contract, civil and maritime, against the American ship or vessel Ellen Brooks, now lying in the port of San Francisco, in the district aforesaid, and within the admiralty and maritime jurisdiction of this honorable court, whereof Isaac Swain now is, or lately was, master, her boats, tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein; and, therefore, the said Rafael Orrego, Marcos Orrego, and Antonio Orrego, do allege and articulately propound as follows, to wit:

First. That on or about the 24th day of April, A. D. 1851, the said ship or vessel Ellen Brooks, whereof Isaac Swain was master, being then in the port of Valparaiso, republic of Chil  and designed upon a voyage on the high seas, and within the flux and reflux thereof, and within the admiralty and maritime jurisdiction of this honorable court, to wit: from the said port of Valparaiso to the said port of San Francisco; the libellants being the owners of certain merchandise, consisting of the following articles, viz:

1,103 sacks barley, containing -	-	-	59,300 lbs.
258 do. walnuts, -	-	-	12,900
170 do. toasted flour or pinole -	-	-	4,250
75 do. do. do. -	-	-	3,750

273 boxes of apples, and 1 bale of samples, of the value of eight thousand dollars (\$8,000,) made a contract with the said Isaac Swain, as such master, whereby he agreed, in consideration of certain freight, to convey the said articles of merchandise, from the said port of Valparaiso to the port of San Francisco aforesaid, and there to deliver the same in good order and condition to the libellants, under the name and style aforesaid, or to their order, and that the libellants, on the same day, delivered to the said master the articles of merchandise aforesaid, in good order, and received from him a bill of lading therefor, whereby the said master became bound to convey to the said port of San Francisco, without delay, and without any unnecessary deviation from the direct and usual course, the articles of merchandise aforesaid.

Second. That the said ship, or vessel, shortly afterwards departed from the port of Valparaiso aforesaid, on her voyage aforesaid; but the said Isaac Swain, master, as aforesaid, not regarding his duty in that respect, nor his obligation and undertaking to convey and deliver said merchandise, as aforesaid, wilfully, negligently, and unnecessarily deviated from the direct and usual course of said voyage; and, passing by the port of San Francisco, proceeded to the port of Benicia, where he delayed unreasonably and unnecessarily a considerable period of time, viz: for the period of twenty days, whereby the merchandise shipped by the libellants, as aforesaid, was greatly damaged and lessened in value, both from decay and other injury sustained by reason

of the said deviation and delay, and also in consequence of a decline in the market value of the said merchandise, at the aforesaid port of delivery, during the unnecessary detention and delay aforesaid, by reason whereof the libellants have sustained damage to the amount of three thousand dollars, for which they bring suit.

Third. That all and singular the premises are true.

Wherefore, the libellants pray that process, in due form of law, may issue against the said ship, her boats, tackle, apparel and furniture, and that this honorable court will pronounce for their aforesaid demand, and decree the same to be paid with costs, and for such other and further relief and redress, as to right and justice may appertain, and as the court is competent to give in the premises.

RAFAEL L. ORREGO, *Libellant.*

BOTTS & EMMETT, *Proctors.*

On the 8th day of August, 1851, appeared personally before me Raphael Orrego, one of the above named libellants, and was sworn to the truth of the foregoing libel.

Sworn before me this 8th day of August, 1851.

WILLIAM BARBER,

United States Commissioner.

Endorsed.

Filed August 8th, 1851.

JOHN A. MONROE, *Clerk.*

DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF CALIFORNIA.

RAPHAEL ORREGO, *et al.*,
vs.
 THE SHIP ELLEN BROOKS. } *Commissioner's report.*

In pursuance of a decretal order made in the above entitled cause, on the 26th day of August, in the year of our Lord one thousand eight hundred and fifty-one, by which, among other things, it was referred to the undersigned, one of the commissioners of this court, to ascertain and compute the amount due the libellants for damages for breach of contract; to the intervenor, James Duncan, for the same cause; to Wm. H. Joliffe for pilotage; to the intervenor, Clarke, the amount due on the bond or instrument set forth in his intervention, and to report thereon to this court with all convenient speed.

I, William Barber, the commissioner to whom the matter was referred, do report, that I have been attended by the proctor for the libellant and the intervenors, and have taken and examined the testimony offered in support of the libellant's claim, and the claims of the intervenors, and do find that there is due to the libellant for damages sustained by breach of the contract stated in the libel, the

sum of - - - - - \$866 00

To the intervenor, James Duncan, for damages sustained
by breach of the contract stated in the intervention - \$1,400 70
To the intervenor, W. H. Joliffe, for pilotage - - 256 00
To the intervenor, Wm. F. Clarke, there is due on the
interest which Caleb A. Smith, and John C. Smith had
in the said ship on the 8th day of October, 1850 - - 3,538 16
All which is respectfully submitted.

WILLIAM BARBER,
United States Commissioner.

SAN FRANCISCO, *September 13, 1851.*

Endorsed.

Filed September 22, 1851.

JOHN A. MONROE, *Clerk.*

NORTHERN DISTRICT OF CALIFORNIA, ss.

*The President of the United States of America, to the marshal of the
northern district of California, greeting:*

Whereas a libel was filed in the district court of the United States for the northern district of California, on the 8th of August, in the year of our Lord one thousand eight hundred and fifty-one, by Raphael Orrego, *et al.*, against the ship *Ellen Brooks*, her tackle, apparel, and furniture, and praying that the same may be condemned and sold to pay the demands of the said libellants; and whereas the said ship has been attached by the process issued out of the said district court in pursuance of the said libel, and is now in custody by virtue thereof; and such proceedings have been thereupon had, and by the interlocutory sentence and decree of the said court, in this cause made and pronounced, on the 28th day of August, one thousand eight hundred and fifty-one, the said ship was ordered to be sold by you the said marshal, after giving six days' notice of such sale, according to law; and that you have the moneys arising from such sale, together with this writ, at a district court of the United States, to be held for the northern district of California, at the city of San Francisco, on the fifth day of September, one thousand eight hundred and fifty-one, and that you then pay the same to the clerk of the court. Therefore, you, the said marshal, are hereby commanded to cause the said ship so ordered to be sold, to be sold in manner and form upon the notice, and at the time and place by law required. And that you have, and pay the moneys arising from such sale pursuant to the aforesaid order or decree; and have you also then and there this writ.

Witness, the honorable Ogden Hoffman, jr., judge of the said court, at the city of San Francisco, in the northern district of California, this 28th day of August, in the year of our Lord one thousand eight hundred and fifty-one, and of our independence the seventy-sixth.

JOHN A. MONROE, *Clerk.*

In obedience to the above precept I have sold the ship *Ellen Brooks*, &c., and such sale amounts to three thousand four hundred and fifteen dollars, which sum I have paid to the clerk of this court, as I am above commanded.

Dated this fifth day of September, 1851.

By D. F. DOUGLASS,
United States Marshal.
GEO. P. JOHNSON,
Deputy.

Endorsed.

Filed, September 5, 1851.

JOHN A. MONROE, *Clerk.*

I, John A. Monroe, clerk of the district court of the United States of America for the northern district of California, do hereby certify that the foregoing papers are full, true, and correct copies of their respective originals, now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand, and affixed the seal of the said court, this sixteenth day of October, in the year of our Lord one thousand eight hundred and fifty-five, and of our independence the eightieth.

By JOHN A. MONROE, *Clerk.*
W. H. CHEVERS, *Deputy.*

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

On this 19th day of October, A. D. 1855, personally appeared before me, a commissioner appointed by the Court of Claims to take testimony, Robert Allen, who being duly sworn to tell the truth, the whole truth, and nothing but the truth relative to the claim of Isaac Swain against the United States of America, does, upon his oath, testify: that his name is Robert Allen; that he is a quartermaster in the United States army; that he is thirty-nine years old; that he has resided for the past year in the city of San Francisco; that he has no interest, either direct or indirect, in the claim of Isaac Swain against the United States; that he is not related to Isaac Swain, the claimant, in any degree whatever.

Question 1. What, in your opinion, would have been the cost to the United States government to have received the cargo of army stores from the ship *Ellen Brooks* as she lay in the western harbor of Benicia and transported them to the government barracks?

Answer. The *Ellen Brooks* anchored about one mile and a quarter below the post; the charter party of the captain required him to carry his vessel to Benicia; the army post to which the vessel evidently was destined was about one mile and a half above the town of Benicia proper. When the captain of the vessel reported himself to me with

this cargo, I told him it was incumbent upon him to carry his vessel up to the post landing ; he declined doing so, because he did not consider his vessel safe at that point ; but, as other vessels had landed there, I refused to receive the stores unless he carried his vessel up to the place ; he claimed that his charter-party only required him to go to the town of Benicia, and that he was not bound to go beyond that limit ; he accordingly anchored his vessel about one mile and a quarter below the post, and reported to me that he was prepared to deliver the army stores at that place, and that he considered he had fulfilled his contract by having his ship anchored at that point. I did not choose to debate the question with him as to the point of landing, but refused to receive the stores unless they were delivered at the common landing of the post. I do not pretend to say but what the captain had a right to anchor his vessel at the place he did, for that depended upon the construction of the charter-party. I did not myself undertake to decide the question, but I refused to receive the stores unless he delivered them at the landing of the post. At the place where he was anchored, presuming that he could not go up to the point designated, it would have been necessary to have sent a vessel down to lighter the goods from the place where he had anchored to the post ; the cost of doing so would have amounted to at least five dollars a ton. The bills of lading shown to me are copies of the bills of lading of the army stores alluded to. I do not suppose that to remove his vessel where I required him to go would have cost him anything, unless the vessel should have been damaged at the landing.—[Note.—The bills shown are attached to the deposition of D. F. Wright.—T. R. Wise.]

Question 2. How far was the government landing from the eastern line of the city of Benicia?

Answer. The government landing was about one quarter of a mile beyond what was understood to be the eastern limits of the city.

Question 3. Do you know any other matter relative to the claim in question? If you do, state it.

Answer. The report I have heretofore made about this matter to the government contains all I know about it ; and I now refer to that report and make it a part of my deposition.

ROBERT ALLEN,

Brevet Major and Acting Quartermaster.

Gwyn Page, esq., appeared for the government, and did not object.

STATE OF CALIFORNIA, }
County of San Francisco. } ss.

On this 19th day of October, A. D. 1855, personally appeared before me, a commissioner appointed by the Court of Claims to take testimony, Robert Allen, the witness within named ; and after being first duly sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within depositions were written down by the commissioner, and then proposed by him to the witness ; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of Robert Allen, taken

at the request of Isaac Swain, to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of Isaac Swain. The adverse party agreed to taking the deposition did attend, and was represented by Gwyn Page, at the request of the solicitor, and he did not object.

TULLY R. WISE,
Commissioner.

Fees of witness	-	-	-	-	-	-	-	\$3 00
Travel.								
Attendance.								
Commissioner's fees	-	-	-	-	-	-	-	13 62

STATE OF CALIFORNIA, }
County of San Francisco. } ss.

On this 24th day of October, 1855, Robert Allen reappeared, by consent of parties, and desired to make a correction, as follows: "I stated in the answer to the first question that the Ellen Brooks lay about one and a quarter miles below the post." I am satisfied I was mistaken; according to a chart shown to me the distance was about five miles, but my own impression is, that it was not more than three miles; I would say from three to five miles. When I gave my deposition at first I was mistaken as to where the vessel lay, and thus was mistaken as to the distance.

ROBERT ALLEN.

TULLY R. WISE,
Commissioner.

CHARTER-PARTY.

It is this day mutually agreed between Isaac Swain, master of the good American ship called the Ellen Brooks, of ———, of the burden of ——— tons, per register, or thereabouts, now lying in the port of Valparaiso, of the one part, and Joshua Waddington, of Valparaiso, merchant, as agent for Major Lee, of the other part; that the said ship, being tight, staunch and strong, and her decks and sides properly caulked, and every way fit for the voyage, shall take in, upon the terms hereinafter mentioned, a quantity of cargo, as per note at foot, and being so loaded, shall therewith proceed direct to Benicia, Upper California, and deliver the same from ship's tackles at the expense of the charterers, agreeable to the bills of lading, and so end the voyage, (restraint of princes and rulers) the dangers of the seas and navigation, fire, pirates, and enemies, during the said voyage always excepted. For the discharging of said cargo ten working days are to be allowed the said merchant, if the ship be not sooner discharged, and from the day she is ready to discharge or unload at Benicia, until finally discharged; time occupied in sailing from port to port not counted as working days. The master is to give notice in writing when he is ready to deliver cargo. The freight to be paid as under four thousand dollars in full. The captain to sign bills of lading without reference

to rate of freight, and without prejudice to this charter party. The ship to find necessary dunnage and mats to keep the cargo clean. The owners to be liable for all damage arising from side ports or lights. Penalty for non-performance of this charter party \$4,000.

The cargo to comprise more or less the following :

4,000 quintals of flour,
500 bushels of beans,
500 bushels of potatoes,
500 bushels of onions,
500 pumpkins,
3,000 pounds of dried peaches.

The master obliges himself to have the potatoes, onions, and pumpkins overhauled and examined whenever the weather will permit, and at the same time have places apart for any that may have got bruised or damaged. The vessel to leave this port before the 30th of April, 1851.

ISAAC SWAIN.
JOSHUA WADDINGTON.

"Witness—CHARLES BROWN,
THOMAS JONES."

VALPARAISO, April 10, 1851.

A true copy.

WM. A. GORDON,
Chief Clerk Quartermaster General's Office.

I certify that I received notice that the ship *Ellen Brooks* was ready to discharge cargo on the 9th of July; and that the said ship did not commence discharging until the 17th of July, on account of the refusal of the collector of the port of Benicia to allow the commissary stores on board to be landed until duties were paid or secured in the same manner as on private property; the collector's permit reached the vessel at one o'clock, p. m.

GEO. PEARCE ANDREWS.
Brevet Major U. S. A., A. C. S.

I certify that the within charter-party has been complied with excepting the non-delivery of eight quintals of flour, valued at forty dollars and thirty-three cents, which is to be deducted from the amount of freight when paid, and is due the subsistence department, and that the discharge of the cargo was completed the 28th day of July, 1851.

GEO. PEARCE ANDREWS.
Brevet Major U. S. A., A. C. S.

BENICIA, CALIFORNIA, October 16, 1851.

I certify that so far as the subsistence department is concerned the within charter has been fully complied with, the flour above mentioned having been paid for.

GEO. PEARCE ANDREWS.
Brevet Major U. S. A., A. C. S.

A true copy.

WM. A. GORDON,
Chief Clerk Quartermaster General's Office.

By this public instrument of protest before me, Harvey Lee, notary public, personally came and appeared Isaac Swain, master of the ship, or vessel, called the Ellen Brooks, of Boston, of the burden of four hundred and sixty-four tons, or thereabouts, and that said Swain doth hereby declare that having been chartered by certain parties at Valparaiso, Chil , to carry sundry merchandise to the United States government agents at Benicia, California, further declareth, that having arrived at the city of Benicia aforesaid, on the eighth day of July, 1851, being conducted to said city by a well known branch pilot, and anchored in safety at said city of Benicia, and that when said ship was so anchored, that the said Swain, in compliance of his charter, gave notice to the United States quartermaster that he was ready to deliver to government the goods to them belonging; but that the said quartermaster refused to accept the government property unless the said ship was hauled alongside of the government storehouse, some miles from the anchorage; and that on the ninth day of July aforesaid, having seen Major Andrews, the acting Major commissary of subsistence, who informed me that I must take my ship to the government hulk, or storehouse, to discharge my cargo, or he could not accept the goods, and then ordered me to proceed to said storehouse, which order was by me obeyed, and said ship hauled as near to the said government warehouse as she could be hauled, for the said ship having grounded on the bottom before she was fully alongside of the said government hulk, and that the situation of said hulk, and the surrounding rocks and flats, would not permit the said ship, Ellen Brooks, to haul alongside of said hulk to discharge with convenience, and at the same time said ship is in imminent danger. But having thus placed the said ship in said state, by the order of said Andrews, of the subsistence department, did, on the ninth day of July aforesaid, notify him in writing that I was ready to deliver to him all the government stores, which he, the said Andrews, as well as the quartermaster, Major Allen, promised me should commence on the following day, the tenth instant, to discharge my ship. But that on the following day, the 10th of July aforesaid, it was discovered that the collector of the customs would not grant a permit for said government stores to be landed, thus creating much detention and damage to both ship and cargo. Now, therefore, I, the said Isaac Swain, do by this declare and protest, and by these presents doth solemnly protest against all and every person or persons, governments and authorities whom it shall or may concern, and doth further declare that all damages, losses, or detriments of every name, nature, and description, that have or may happen to the said ship or cargo, since her anchoring at the said city of Benicia, aforesaid, on the eighth day of July, 1851, are and ought to be borne by the said government of the United States, or its agents, the same having occurred as before mentioned, and not by the insufficiency of said ship, or the neglect of said appearer, his officers, or his mariners.

ISAAC SWAIN.

Subscribed and sworn to before me this 12th day of July, A. D. 1851.

H. LEE, *Notary Public*. [L. s.]

HEADQUARTERS, DEPARTMENT OF THE PACIFIC,
San Francisco, April 11, 1854.

SIR: In reference to your claim on the government of the United States, I would remark that, from the report of Major Allen, assistant quartermaster to the Secretary of War, dated 25th May, 1852; the report of Major Cross to these headquarters, dated April 1, 1854, and the several statements, numbering from one to fourteen, which you submitted for my examination, it appears that the ship *Ellen Brooks* was chartered the 10th day of April, 1851, by an agent of the United States commissary of subsistence, to transport subsistence stores on account of the United States from Valparaiso to Benicia, in California. It appears also that the captain of the ship *complied with charter when he arrived at Benicia*, the 8th day of July, 1851; but the assistant quartermaster, nor the assistant commissary of subsistence, *would not receive the stores* unless landed at the public wharf, which was not at the time within the limits of the town of Benicia. The captain of the ship, however, complied with the orders of the assistant commissary, and *proceeded to the landing of the depot of the post*, just beyond the boundary of Benicia, by which the vessel became *seriously injured*. It likewise appears that, after the ship occupied the *position designated by the commissary of subsistence*, the captain *was prevented eight days from landing the stores* by the collector of the port, he refusing to give a permit to land them *until* the payment of duties on the government cargo. The commissary of subsistence remonstrated against the payment, and the question was referred to the collector of San Francisco, and, consequently, eight days were consumed in the reference, for which delay you claim damages.

From all the facts and circumstances of the case, it seems to me you have *just and equitable claims* for damages on the government of the United States. I think, however, you claim much more than you are entitled to. The *damages* which your ship sustained by going to the post wharf, and the *damages consequent to the detention of the ship and cargo* by the collector of the port, *I think ought to be allowed*; beyond this I have no data by which I can arrive at a just conclusion in regard to the residue of your claims.

I am, very respectfully, your obedient servant,

JOHN E. WOOL,
Major General.

Capt. ISAAC SWAIN, *San Francisco, Cal.*

Your petitioner would also refer to the following *official* letter from Major Cross, quartermaster United States army, to Major E. D. Townsend, assistant adjutant general of the Pacific division:

CHIEF QUARTERMASTER'S OFFICE, DEPARTMENT OF THE PACIFIC,
San Francisco, April 1, 1855.

MAJOR: In obedience to the instructions of the major general commanding, I have examined the *charty-party* and papers relative to the ship *Ellen Brooks*, which was chartered in Valparaiso, on the 10th of

April, 1851, by Mr. Joshua Waddington, merchant of that place, and agent for *Major Lee*, commissary, to transport commissary stores from that port to Benicia, and have the honor to report my opinion.

First. The captain of the ship *Ellen Brooks* complied with her charter, when she reached the port of Benicia, and it was not binding on him to deliver the stores at any other place but at the port of Benicia, unless it had been so expressed.

Second. The vessel was detained by the collector not allowing her to land her stores, as requested by the captain.

Third. Orders were given by the assistant commissary for her to proceed to the landing of the depot of the post of Benicia, and not by orders of the assistant quartermaster, where she sustained damages as set forth by the several affidavits; where, by complying with those instructions, she not only became injured, but in point of law vitiated her insurance. I therefore consider, that under these circumstances, so far as the amount of charges are made for fitting the vessel for sea, it is a just and equitable claim; as to the damages sustained otherwise, &c., it is not my province to decide, and can only be regulated by Congress.

In closing my views on this subject, I will here state that it was a matter with which the quartermaster's department had nothing to do. The contract was made by the agent of another department, and the only duty to be performed was to transport the stores to the storehouse, after being landed. Therefore, while the owners of said vessel have a just demand on the government for the repairs of said vessel, it is not a proper charge against the quartermaster's department, but more properly against the subsistence department, under whose instructions the vessel seems to have been directed.

Very respectfully, sir, your obedient servant,

O. CROSS,

Major and Quartermaster.

To Major E. D. TOWNSEND,

Assistant Adjutant General,

Headquarters Department Pacific, San Francisco.

WASHINGTON, December 24, 1854.

In the year 1851 I was chief and supervising commissary of subsistence to the Pacific division of the army.

On reaching San Francisco, from a tour of service, on the 15th of July, 1851, it was reported to me by Major Eaton, commissary of that station, that the ship *Ellen Brooks* had arrived at Benicia on the 9th instant, partly laden with army supplies from Chil , and that the collector of customs held the ship in custody for the payment of duties upon the army supplies, which neither himself nor the commissary at Benicia felt authorized to pay.

Without loss of time I proceeded to Benicia, remonstrated with the collector against the legality of the charge and demanded the army supplies, which he persisted in refusing to surrender unless the duties

were paid. The case was then referred to commanding General Hitchcock, who considered he had no authority to interfere.

The ship was then at the government landing, a custom-house officer in charge, the hatches closed and sealed, and the cargo evidently in a state of fermentation. To avoid the total destruction of the cargo, consisting of a large supply of flour and beans, besides the vegetables, I tendered the collector a draft on the Commissary General of Subsistence, conditional and subject to the proper head of department, for the amount of duties claimed. This was declined by the collector, but after two days' delay and consultation with Collector King, at San Francisco, accepted, and the army supplies released.

Upon removing the custom-house seals and hatches, the upper cargo, consisting of vegetables and dried fruit, presented a shocking spectacle of decay and fermentation. The bags containing onions and potatoes were dripping wet, and had become so rotten that many of them fell to pieces in the act of hoisting; dense clouds of putrid steam escaped from the hold, and the vegetables turned out almost a total loss.

Any similar cargo, on private account, must have shared the same fate, and the *loss justly attributable to the detention of the ship ten or twelve days with closed hatches.*

R. B. LEE,
C. S., Major United States Army.

P. S. The draft, when presented, was cancelled by the Secretary of the Treasury, and the act of the collector pronounced illegal.—(See also appendix N.)

TREASURY DEPARTMENT, SECOND COMPTROLLER'S OFFICE,
March 15, 1852.

SIR: I return the papers connected with the claim of *Isaac Swain*, referred from your office for opinion. Demurrage, strictly speaking, is only allowable where it is expressly provided for in the charter-party.

In cases where the time to be allowed for discharging the cargo is specified, but no rate of compensation for additional delay is fixed, the owners of the vessel are entitled to damages for such delay in the nature of demurrage, and estimated on the same principle. But these damages under such a contract must be confined to the particulars usually included in demurrage, and cannot be extended to compensation for remote consequences produced in the execution of other and subsequent contracts by the delay; because such delays are to be anticipated in making contracts of this character and are often unavoidable, and the usage of trade as well as the whole tenor of the charter-party contemplates in such an event only an allowance for the additional time and expenses of the vessel. It would be highly unreasonable to permit the owner of a vessel, after making a freighting contract which specifies a certain number of days for reception of the cargo, to enter into another agreement with different parties, the completion of which, under a heavy penalty, depends upon the delivery of the first cargo within the time fixed, and then in the event of

detention beyond that time, to throw the whole consequences upon the first freighter in the shape of damages for breach of his contract. No one would enter into such a charter-party, if a detention which, in the ordinary course of business, must frequently arise from causes beyond control, might occasion such unreasonable and incalculable damages. It is for the owner of the vessel to avoid placing himself in such a position in regard to subsequent contracts, that a short, accidental and probable delay in completing the first, should involve him in such serious consequences. In the present case, though the facts in regard to the larger items of the claim do not fully appear, enough is shown to render it probable that Captain Swain has a just claim upon the government for a considerable portion of the loss he has sustained. That claim, however, is not upon the quartermaster's department, nor within their jurisdiction to adjudicate.

It can only be considered there so far as it is founded upon the specific provisions of the charter-party. Beyond that, application must be made in another quarter. Regarding it in this light, I think the claimant is clearly entitled to damages in the nature of demurrage, under the penal clause in the contract, for the eight days' detention of his vessel beyond the time specified. These damages have been estimated by the surveyors at seventy-five dollars per day. I cannot regard the other items of the claim as admissible. They do not arise legitimately upon the contract, but from the alleged misconduct of officers of other departments of the public service. The damages recovered of Captain Swain in the district court, and the attendant expenses of that transaction, are probably attributable less to the detention than to the sealing down of the hatches by the collector. For this interference the quartermaster's department is not responsible; and the injuries claimed to have been sustained by the vessel in being compelled to unload at an improper place did not arise by the act of any officer of that department, or from the breach of any stipulation of the contract.

I recommend, therefore, the payment of the estimated damages for the eight days' delay, and nothing more.

E. J. PHELPS,
Comptroller.

Major General JESUP,
Quartermaster General.

DEPOT OF SUBSISTENCE,
Benicia, California, July 10, 1851.

SIR: Your notification of arrival and readiness to discharge the cargo of the ship *Ellen Brooks*, containing subsistence stores for the army, yesterday afternoon, was duly received.

Very respectfully, your obedient servant,

GEO. PEARCE ANDREWS,
B. Major U. S. A., A. C. S.

To Captain ISAAC SWAIN,
Of the ship Ellen Brooks.

P. S.—Your coming up to the government landing was in compliance with my directions, as customary in like cases.

GEO. PEARCE ANDREWS,
B. Major U. S. A., A. C. S.

S. 424.

IN THE HOUSE OF REPRESENTATIVES, *December 15, 1854.*

Referred to the Committee of Claims.

FEBURARY 2, 1855.

Reported back by Mr. BOYCE, without amendment, and committed to a Committee of the Whole House to-morrow.

AN ACT for the relief of Isaac Swain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War be authorized and directed to cause to be paid to Isaac Swain, out of any money in the treasury not otherwise appropriated, the sum of four thousand one hundred and fifty dollars, for damages and detention of the ship "Ellen Brooks," the property of said Swain, while employed in conveying military supplies from the port of Benicia to the government post near that place, by order of the proper officers, and the detention of the vessel beyond the time stipulated in the charter party.

Passed the Senate December 13, 1854.

Attest:

ASBURY DICKINS,
Secretary.

No. 323—*Temporary.*

In pursuance of an act of the Congress of the United States of America, entitled "An act concerning the registering and recording of ships or vessels," Isaac Swain (two-eighths) having taken or subscribed the oath required by the said act, and having sworn that he, together with John E. Smith, (three-eighths,) of the State of Massachusetts, and Caleb A. Smith, (three-eighths,) of New York, are the only owners of the ship or vessel called the "Ellen Brooks," of Boston, whereof Isaac Swain is at present master, and a citizen of the United States, as he hath sworn, and that the said ship or vessel was built at Medford, State of Massachusetts, in the year 1834, as per register No. 525, issued at Boston, December 4, 1849, now cancelled. Property changed.

And said register having certified that the said ship or vessel has

two decks and three masts, and that her length is one hundred and thirty-seven feet four inches; her breadth twenty-seven feet; her depth thirteen feet six inches; that she measures four hundred and sixty-four and seventy-six ninety fifths tons; that she is a ship, has a square stern, and a billet head. And the said Isaac Swain having agreed to the description and admeasurement above specified, and sufficient security having been given, according to the said act, the said ship has been duly registered at the port of San Francisco, California.

Given under my hand and seal at the port of San Francisco this
[SEAL.] 28th day of October, in the year one thousand eight hundred and fifty.

I certify the above to be a true copy from the records of this office.

J. WATSON,
Deputy Collector.

CUSTOM-HOUSE, SAN FRANCISCO,
October 18, 1855.

SAN FRANCISCO, *September 9, 1851.*

No. 323—Cancelled. Property changed. Sold by United States marshal, by order of district court.

WASHINGTON, *December 24, 1854.*

In the year 1851 I was chief and supervising commissary of subsistence to the Pacific division of the army.

On reaching San Francisco, from a tour of service, on the 15th July, 1851, it was reported to me by Major Eaton, commissary of that station, that the ship *Ellen Brooks* had arrived at Benicia on the 9th instant, partly laden with army supplies from Chile; and that the collector of customs held the ship in custody for the payment of duties upon the army supplies, which neither himself nor the commissary at Benicia felt authorized to pay.

Without loss of time I proceeded to Benicia, remonstrated with the collector against the legality of the charge, and demanded the army supplies, which he persisted in refusing to surrender unless the duties were paid. The case was then referred to commanding General Hitchcock, who considered he had no authority to interfere.

The ship was then at the government landing, a custom-house officer in charge, the hatches closed and sealed, and the cargo evidently in a state of fermentation.

To avoid the total destruction of the cargo, consisting of a large supply of flour and beans, besides the vegetables, I tendered the collector a draft on the Commissary General of Subsistence, conditional and subject to the proper head of department for the amount of duties claimed; this was declined by the collector, but after two days' delay and consultation with Collector King, at San Francisco, accepted, and the army supplies released.

Upon removing the custom-house seals and hatches, the upper cargo, consisting of vegetables and dried fruits, presented a shocking spectacle of decay and fermentation; the bags containing onions and potatoes were dripping wet, and had become so rotten that many of them fell to pieces in the act of hoisting. Dense clouds of putrid steam escaped from the hold, and the vegetables turned out almost a total loss.

Any similar cargo on private account must have shared the same fate, and the loss justly attributable to the detention of the ship ten or twelve days with closed hatches.

R. B. LEE,
Com. of Subsistence, Major United States Army.

P. S. The draft, when presented, was cancelled by the Secretary of the Treasury, and the act of the collector pronounced illegal.

WASHINGTON, June 12, 1854.

GENTLEMEN: Permit me to draw your attention to my claims on government of the United States, in the case of the ship *Ellen Brooks*, for damages, in the transportation of army stores from Valparaiso, Chil , to Benicia, in California, as follows:

<i>First.</i> For violation of charter contract	\$4,000
<i>Second.</i> For transporting the cargo of army stores from Benicia and landing the same on the government wharf, at the government military barracks	5,000
<i>Third.</i> For damages to said ship in proceeding, by order of a United States officer, beyond the limits of the charter contract	3,550
<i>Fourth.</i> For damage of cargo, as per award of United States district court, caused by the United States collector at the port of Benicia	6,500
<i>Fifth.</i> For the full cost of said ship <i>Ellen Brooks</i> , as per purchase from Macondray & Co., of San Francisco	10,000
	29,150

For all of which you have the testimony of General Wool, Major R. B. Lee, and several officers of the army, the comptroller's report, and the testimony of several highly respectable ship masters, ship carpenters and riggers, and some others, all of which prove the justness of my claim, and for which I seek compensation from government, and respectfully ask your favorable report to the United States Senate for the amount of said claims, if found to be just, and that speedy action thereon may be taken is the prayer of

Your obedient servant,

ISAAC SWAIN.

The Hon. SENATE COMMITTEE ON CLAIMS.

WASHINGTON, *January 10, 1855.*

To all whom it may concern, greeting :

This is to certify that I, George Simpton, of San Francisco, California, have been a resident of that State since the year 1849 ; that I was harbor-master of the port of said San Francisco in 1851 and 1852, and was well acquainted with the prices of labor in and about all the waters of San Francisco bay, especially in the lighterage and transportation of merchandise to and from ships to the shore ; and hereby testify that, in the year 1851, the price for lightering merchandise from the ships in the harbor of San Francisco to the shore or piers, a distance not exceeding one half a mile, was two dollars per ton. And the undersigned was also acquainted with the value of labor at Benicia and Sacramento, and believes the price of labor at the last mentioned places to have been as high as at San Francisco. He is also well acquainted with the location of Benicia and Navy Point, in California. And further believes that, to lighter a cargo of merchandise from the lower harbor of Benicia to Navy Point, in the year 1851, would have cost not less than five dollars per ton ; and, considering that the current in the straits of Carquenez is so strong that lighters can only pass up or down with the tide, and but one load per day taken, it might have cost from five dollars per ton to seven dollars per ton.

In witness whereof I have this day set my hand.

G. SIMPTON.

DISTRICT OF COLUMBIA, }
Washington County. } ss.

On this 19th day of January, in the year of our Lord one thousand eight hundred and fifty-five, before the subscriber, a justice of the peace in and for said county, personally appeared George Simpton, and acknowledged the within instrument of writing to be his act and deed for the purposes therein expressed.

Given under my hand and seal.

B. K. MORSELL, J. P. [SEAL.]

WASHINGTON, *December 30, 1854.*

GENTLEMEN : In the report of the Senate Committee of Claims, now before you, it appears they are adverse to my claim on the government for the spoliation of cargo, resulting from the action of the acting commissary of the army, George P. Andrews, and of William Gallier, collector of the port of Benicia, California. But I have now in my possession such evidence as I think will enable the Senate committee to reverse their decision, and to report more favorably on my claim, and beg leave to lay the same before you for your consideration, hoping that this additional evidence is sufficient to warrant you to approve and allow that part of my claim for damage to cargo, which was awarded by the United States district court for the northern district of California.

I would now respectfully draw your attention to the evidence in support thereof: Firstly, you have before you the evidence of George Sears, the chief mate of the ship *Ellen Brooks*. He testifies that the cargo of said ship was in good order and sound condition on the arrival of said ship *Ellen Brooks* at Benicia, California, on the 8th day of July, 1851, and also that the collector of Benicia aforesaid, on that day took possession of said ship, and closed her hatches. Secondly, you have before you the evidence of Major General Lee, of the United States army. He testifies what the condition of said cargo was on the 17th day of July, 1851, showing conclusively the decayed condition of the cargo of the ship *Ellen Brooks* on that day, when her hatches were unsealed, and opened by order of the collector of Benicia.

He also testifies that the said collector refused to deliver the cargo of army stores on account of the non-payment of the duties thereon, for the space of ten days, and that the said collector kept the said ship's hatches sealed and closed during that time, and that when they were opened, in his presence, that the perishable portion of my cargo was totally destroyed.

He also testifies that Major Andrews, the acting commissary of the army, refused to pay the duties required by the collector aforesaid, which caused him to refuse to deliver my cargo, and to seal my ship's hatches, whereby my cargo was destroyed, and for which my ship became responsible, was libelled by the United States marshal, and the sum of \$6,060 86 awarded libellants as damages, and \$643 63 as cost by the United States district court for the northern district of California, as shown by the clerk of said court; and said ship subsequently sold by order of said court to satisfy said libellants.

The above being facts sustained by indubitable evidence, the undersigned respectfully asks your attention to them; and if, upon investigation, you find the evidence substantiates that portion of my claim for damages to cargo, I hope you will cheerfully award me those amounts, together with the amount already allowed by the Senate, and report the same to the House as early as possible, whereby you will confer a great favor upon

Your obedient servant,

ISAAC SWAIN.

ALFRED P. EDGERTON, *Chairman Committee on Claims.*

WASHINGTON, *January 23, 1855.*

GENTLEMEN: This being the day on which you again meet for the investigation of claims, the undersigned begs leave to draw your attention to his claims for damages to the ship *Ellen Brooks* and her cargo, whilst in the service of the government in transporting supplies from Chil  to California for the United States army, and by which he suffered heavy losses, the evidence of which is now before you, and he hopes sufficient to prove to your entire satisfaction that his claims

are just. It is for you to decide; and he respectfully asks at your hands a *speedy* decision on them, according to evidence and justice.

I am very respectfully, your obedient servant,

ISAAC SWAIN.

ALFRED P. EDGERTON, *Chairman Committee on Claims.*

WASHINGTON, *December 24, 1854.*

In the year 1851 I was chief and supervising commissary of subsistence to the Pacific division of the army.

On reaching San Francisco, from a tour of service, on the 15th of July, 1851, it was reported to me by Major Eaton, commissary of that station, that the ship *Ellen Brooks* had arrived at Benicia on the 9th inst., partly laden with army supplies from Chil , and that the collector of customs held the ship in custody for the payment of duties upon the army supplies, which neither himself nor the commissary at Benicia felt authorized to pay.

Without loss of time I proceeded to Benicia, remonstrated with the collector against the legality of the charge, and demanded the army supplies, which he persisted in refusing to surrender unless the duties were paid. The case was then referred to Commanding General Hitchcock, who considered he had no authority to interfere.

The ship was then at the government landing, a custom-house officer in charge, the hatches closed and sealed, and the cargo evidently in a state of fermentation.

To avoid the total destruction of the cargo, consisting of a large supply of flour and beans, besides the vegetables, I tendered the collector a draft on the Commissary General of Subsistence, conditional, and subject to the decision of the proper head of department, for the amount of duties claimed. This was declined by the collector, but after two days' delay and consultation with Collector King, at San Francisco, accepted, and the cargo of army supplies released.

Upon removing the custom-house seals and hatches, the upper cargo, consisting of vegetables and dried fruits, presented a shocking spectacle of decay and fermentation. The bags containing onions and potatoes were dripping wet, and had become so rotten that many of them fell to pieces in the act of hoisting; dense clouds of putrid steam escaped from the hold, and the vegetables turned out almost a total loss.

Any similar cargo on private account must have shared the same fate, and the losses are justly attributable to the detention of the ship ten or twelve days with closed hatches.

R. B. LEE,

C. S. Major United States army.

P. S. The draft when presented was *cancelled* by the Secretary of the Treasury, and the act of the collector pronounced *illegal*.

WASHINGTON, *December 24, 1854:*

In the year 1851 I was chief and supervising commissary of subsistence to the Pacific division of the army.

On reaching San Francisco, from a tour of service, on the 15th of July, 1851, it was reported to me by Major Eaton, commissary of that station, that the ship *Ellen Brooks* had arrived at Benicia on the 9th inst., partly laden with army supplies from Chil , and that the collector of customs held the ship in custody for the payment of duties upon the army supplies, which neither himself nor the commissary at Benicia felt authorized to pay.

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Any similar cargo on private account must have shared the same fate, and the loss justly attributable to the detention of the ship ten or twelve days with closed hatches.

R. B. LEE,

C. S. Major United States army.

P. S. The draft when presented was cancelled by the Secretary of the Treasury, and the act of the collector pronounced illegal.

WASHINGTON, *January 8, 1855.*

SIR: You are, by your position, a tangible part of the government of these United States, and, as a member of the Committee on Claims, a judge between the people and the government, and as such, entitles me, a citizen thereof, to address you on the subject of certain claims that I have upon the said government, for damages which accrued to the ship *Ellen Brooks*, and to the cargo on board of her, in July,

1851, while in the service and under the control of the lawfully authorized officers of that government, by whose acts great damage was done to my ship and cargo, and for which I now seek that remuneration which justice in the case may require.

The evidences in support of my claims are now before your committee, on which you doubtless will sit in judgment and decide their validity, and I respectfully desire to draw your attention to the testimony of George Sears, the chief mate of said ship, and to that of Major R. B. Lee, of the United States army, who were eye-witnesses to the causes that led to the damages to the ship, and the destruction of the cargo. The testimony of Major Lee, who is now in this city, is unimpeachable, and I hope alone sufficient to satisfy you that my claim is just, and if just, the undersigned respectfully asks that the committee will favor him with an early report on his claims to the House, that early action may be taken.

I am, very respectfully, your obedient servant,

ISAAC SWAIN.

Hon. DANIEL MACE, *Washington.*

BALTIMORE, *March 25, 1854.*

GENTLEMEN: Permit me to bring to your notice the accompanying report of the Comptroller of the Treasury Department to Major General Jesup, Quartermaster General, to whom was referred the papers respecting the claims for damages sustained by the ship *Ellen Brooks*.

In that report he says that demurage, strictly speaking, is only allowable where it is expressly provided for in the charter-party; and in this case of the *Ellen Brooks* no demurage was mentioned, nor none intended by the contracting parties; for it was intended by the contracting parties that the cargo should be taken out of the ship in four days—two days would have been ample time to have delivered it, although ten days was allowed by charter. Such was the understanding when the charter contract was made, but understandings are not recognized in law. It is only what is written that the law holds as contracts, and what the government will hold as contracts; and, in my contract of charter-party, a penalty of \$4,000 was affixed, which was binding on both parties, which, if I had not complied with, the government would have held me responsible. No evidence whatever has been offered to prove that I did not fulfil, on my part, the charter contract with the government. But, on the other hand, I have undisputed proof that the agents of government, of one department or another, caused the non-fulfilment of the charter contract on the part of government. Consequently, the forfeiture of the penalty of (\$4,000) four thousand dollars therein contained. All the departments of the army admit that serious losses and damages have been sustained by the owner of the ship *Ellen Brooks*, but that their particular department cannot entertain them, and that Congress alone

must meet them by an especial appropriation on the treasury, and for that purpose Congress has been memorialized; the claims have been referred to your honorable committee to report to the Senate the amount justly due.

The Comptroller, in his report, says, in the case of the *Ellen Brooks*: Though the facts in regard to the larger items of the claims do not fully appear, *enough* has been shown to render it probable that Captain Swain has a *just claim* on the government for a considerable portion of the loss he has sustained. That claim, he says, is not on the quartermaster's department, but that application must be made in another quarter to obtain remuneration; meaning, without doubt, application to Congress—the course now pursued. The Comptroller further says, that the damages recovered of Captain Swain in the district court, and the attendant expenses of that transaction, are attributable to the sealing down of the hatches by the collector of the port of Benicia, more than to the detention of the ship, which is altogether immaterial, so long as the justness of the claim is admitted. But, in regard to damages sustained by the *Ellen Brooks* proceeding to military post above Benicia, clears the quartermaster's department of all blame, but says nothing of the assistant commissary's orders, Major Andrews, whose evidence you have that the ship *Ellen Brooks* proceeded to the government post under his directions. I informed him at the time that I should comply with his instructions under protest, and hold him and the government for the valuation of charter contract, and for all damages which might accrue in obedience thereto. The result of thus complying with the instruction of Major Andrews was serious damages to the said ship *Ellen Brooks* as set forth in my claims, and attested to by Captain William Porter, agent of the Pacific Mail Steamship Company at Benicia, and other honorable witnesses, as set forth in my affidavits, all of which I presume are before you.

I will beg leave to draw your attention to one other fact, which is this: It is, I presume, proved to you that I had fulfilled my charter contract when the ship anchored at Benicia. But yet the agents of the government admitted I could so construe the charter, yet they would not accept the commissary stores at Benicia, because it would subject the government to an expense of (\$5,000) five thousand dollars to receive them there at the ship's tackles, and transport them to the army barracks or storehouses. I contend that, having on my part fulfilled the charter-party when I had reached Benicia, that, inasmuch as I was compelled to proceed beyond the limits of my charter for the accommodation of the government, that I am justly entitled to be remunerated for performing that which would have cost the United States government \$5,000 to perform, and respectfully request that you will consider this item with the other claims of the *Ellen Brooks* heretofore presented, which, together with the testimony of Major R. B. Lee, Major Andrews, General Wool, Major Cross, and the numerous other testimonies that have been produced, I cherish the hope that sufficient evidence has been shown that my claims on the government for damages in the case of the ship *Ellen Brooks* are just and equitable, and that you will thereby be enabled so to report to the

Senate of the United States, that they may act upon it and render justice where justice is due.

I am, very respectfully, your obedient servant,

ISAAC SWAIN.

P. S. Should further evidence be required, I respectfully ask that Major R. B. Lee, who was on the spot, may be summoned before the committee for his testimony in the case.

Very respectfully, your obedient servant,

ISAAC SWAIN.

WASHINGTON, *May 30, 1854.*

GENTLEMEN: I beg leave to condense the claims of the undersigned, on account of the ship *Ellen Brooks*, to the following particulars:

First. That the charter contract was fulfilled on my part when the ship reached Benicia, California.

Second. That the United States government violated said charter, and forfeits the penalty of \$4,000 therein contained.

Third. That said ship was compelled to proceed beyond the limits of her charter to unload the government stores, in order to prevent an expense to the government of the sum of \$5,000, which it would have cost the government to have received said cargo at Benicia, according to the charter contract.

Fourth. That said ship received damages to the amount of \$3,500, in proceeding, as per orders of the government agents, beyond the charter contract to an unsafe place, to discharge her cargo of government stores.

Fifth. That the collector of the port of Benicia took unlawful possession of said ship, closed her hatches for ten consecutive days, which destroyed much cargo; which caused said ship to be libelled and sold, by a decree of the United States court, to meet judgments of \$6,500 awarded by said court.

Sixth. That said ship *Ellen Brooks* was purchased in October, 1850, at \$10,000, and was valued at that sum when she arrived at Benicia, in July, 1851.

Seventh. That the vexatious expenses of lawsuits, arising from the delay and detention of said ship at Benicia, together with the great loss of time and total derangement and suspension of business which followed the loss of the ship, was equal to \$10,000, and which is respectfully submitted for your consideration by

Your most obedient servant,

ISAAC SWAIN.

Hon. COMMITTEE OF CLAIMS,
United States Senate.

To the honorable the Senate and the House of Representatives in Congress assembled:

The undersigned would most respectfully present to the honorable Senate and House of Representatives the following petition for redress

H. Rep. c. c. 41—4

for spoliation and losses of property to the undersigned, master and owner of the ship *Ellen Brooks*, in prosecuting a voyage on account of the United States government from Valparaiso, republic of Chile, to the port of Benicia, California, wherein the undersigned performed (to the letter) on his part the contract of charter, but that the government agents at the military barracks near Benicia, on the part of government, totally failed to perform the said charter contract, and compelled the undersigned, the petitioner, to proceed with his ship, the said *Ellen Brooks*, beyond the limits of his charter contract to an unsafe and dangerous place to discharge his ship, whereby his said ship suffered great damage in coming in contact with sunken rocks; and, furthermore, said ship *Ellen Brooks* had on board much cargo of a perishable nature, and which was destroyed in consequence of the said ship *Ellen Brooks* being unwarrantably detained at the said barracks by the quarrelling of government officers. The commissary at the barracks refusing to pay duties on government stores, and the collector at Benicia refusing to permit said stores to be landed until the duties thereon were paid, by which, and other difficulties, the detention of said ship occurred, causing all the great and heavy losses to the petitioner, as herein set forth in the accompanying documents; and, therefore, respectfully prays your honorable bodies to grant him that relief which he believes to be justly due him, and will, as in duty bound, ever pray.

Very respectfully, your obedient servant,

ISAAC SWAIN.

SAN FRANCISCO, *November 15, 1853.*

SAN FRANCISCO, *November 15, 1853.*

SIR: Enclosed please find copies of the documents shown you when here regarding the ship *Ellen Brooks*, and through her my claims on the government for losses sustained; copies of the same are on file in the proper bureau in Washington, and presume, if compared, will be found correct.

When these documents come into your possession you will confer lasting obligations on the undersigned to present them without delay, for the consideration of Congress, and to urge the payment thereof with all the powerful influence which your long participation in the affairs of government has conferred upon you.

And remain, with much respect, your obedient servant,

ISAAC SWAIN.

Hon. WILLIAM GWINN.

P. S. Will you have the goodness to inform me, from time to time, of the progress of the business, as well as the prospect of remuneration which should follow, for my losses were very great.

Your obedient servant,

ISAAC SWAIN.

To the honorable the Senate and the House of Representatives in Congress assembled:

The undersigned would most respectfully present to the honorable Senate and House of Representatives the following petition for redress for spoliation and losses of property to the undersigned, master and owner of the ship *Ellen Brooks*, in prosecuting a voyage on account of the United States government from Valparaiso, in Chile, to the port of Benicia, California, wherein the undersigned performed (to the letter) on his part the contract of charter, but that the government agents at the military barracks near Benicia, on the part of government, totally failed on their part to perform the said charter contract and compelled the undersigned, the petitioner, to proceed with his ship the said *Ellen Brooks* beyond the limits of his charter contract to an unsafe and dangerous place to discharge his ship, whereby said ship suffered great damage in coming in contact with sunken rocks; and, furthermore, said ship, *Ellen Brooks*, had on board much cargo of a perishable nature, which was destroyed in consequence of the said ship *Ellen Brooks* being unwarrantably detained at the said barracks, by the quarrelling of government officers. The commissary at the barracks refusing to pay duties on government stores, and the collector at Benicia refusing to permit said stores to be landed until the duties thereon were paid, by which, and other difficulties, the detention of said ship occurred, causing all the great and heavy losses to the petitioner, as herein set forth in the accompanying documents; and, therefore, respectfully prays your honorable bodies to grant him that relief which he believes to be justly due him, and will, as in duty bound, ever pray.

Very respectfully, your obedient servant,

ISAAC SWAIN.

SAN FRANCISCO, *November 15, 1853.*

I certify I have carefully examined the certificates of Captains William Porter, John Fensley, Richard C. Williams, shipmasters, and of Paul B. Macy and Charles F. Swain, shipmasters; of Phineas Hudson, shipwright, and Addison Plummer, rigger, which, when properly attested, are entitled to full credence; and that it appears from these certificates that the owners of the ship *Ellen Brooks* have a just and equitable claim against the United States government for the amount of damages sustained by said ship as set forth in the above certificates, and also for the amount of demurrages estimated on account of detention.

GEO. PEARCE ANDREWS,

Brevet Major U. S. A., A. C. S.

BENICIA, *California, August 4, 1851.*

A true copy.

WM. H. GORDON,

Chief Clerk Quartermaster General's Office.

SAN FRANCISCO, *July 31, 1851.*

SIR: The bearer, Captain Isaac Swain, of the ship *Ellen Brooks*, a vessel freighted at Valparaiso with army subsistence, has met with much unavoidable detention at the port at Benicia, in consequence of an interposition by the collector of that port, refusing to permit his cargo to be landed, his vessel sustained material damage or injury by striking a rock whilst hauling alongside of the government wharf.

Therefore, I respectfully recommend his claims for detention and for the injuries sustained by his ship to your favorable consideration.

I am, sir, with much respect, your obedient servant,

R. B. LEE,
C. S. Major U. S. A.

To Major General JESUP,
Quartermaster General, U. S. A.

A true copy.

WM. H. GORDON,
Chief Clerk Quartermaster General's Office.

We, Phineas Hudson, shipwright, and Addison Plummer, rigger, residents of San Francisco, California, do jointly and severally declare and attest, unto all whom it may concern, that on the second day of August, A. D. 1851, at the instance of Isaac Swain, we went on board of the ship *Ellen Brooks*, of Boston, of the burden of 464 tons, or thereabouts, and examined the damages as far as we can discover, to wit:

To repair rudder and main channel, three hundred and fifty dollars	- - - - -	\$350 00
To move said ship to shear ship, caulk upper works, remove stores and ballast, send down top gallant mast yards and mast, heave topmast, heave her out, replace stores and ballast, send up yards and topmast, set up the rigging, and replace ship to her moorings, will require the sum of thirty-two hundred dollars	- - - - -	3,200 00
		<u>3,550 00</u>

Whatever damages the bottom of said ship has sustained must be an additional charge. All which we are ready to affirm upon oath when thereto required.

In witness whereof we have hereunto set our hands this twenty-fourth day of August, in the year of our Lord one thousand eight hundred and fifty-one.

PHINEAS HUDSON,
Shipwright.
ADDISON PLUMMER,
Rigger.

Witness, E. J. MOORE.

STATE OF CALIFORNIA, }
 County of San Francisco. } ss.

On the 23d day of August, A. D. 1851, before me, a notary public in and for said county, came Phineas Hudson and Addison Plummer, who by me being duly sworn, deposed and said that the within is a fair and proper estimate for materials and labor to repair the work therein specified, in order to make said vessel seaworthy.

In witness whereof I have hereunto set my hand and affixed my seal of office the day and year last above written.

E. J. MOORE, [SEAL.]
Notary Public.

A true copy.

WILLIAM A. GORDON,
Chief Clerk Quartermaster General's Office.

We, whose names are hereunto subscribed, shipmasters, have this day, at the instance of Isaac Swain, master of the ship called the Ellen Brooks, of Boston, of 464 tons burden, or thereabouts, examined the said ship Ellen Brooks, taken the testimony of the officers of said ship, and the evidence contained in the log-book of said ship, and do jointly and severally declare and attest, unto all whom it may concern, that from the examination and evidence obtained, that great damage has been done to the said ship Ellen Brooks, and that we have also examined the estimates of repair necessary to put said ship in order to proceed to sea, said estimates having been furnished by Phineas Hudson, shipwright, and Addison Plummer, rigger and stevedore, competent and judicious men at their respective occupations, and from our experience of expense attending shipping at this port, are of the opinion that it will require the full sum of \$3,550 to put said ship Ellen Brooks in order to proceed to sea, (as reported in survey of Hudson and Plummer,) and that it is necessary to do the above repairs in order to effect insurance on said ship, to all which we are ready to affirm upon oath.

In witness whereof we have hereunto set our hands this 4th day of August, A. D. 1851.

PAUL B. MACY,
 CHARLES F. SWAIN.

Witness, E. J. MOORE.

Sworn to before E. J. Moore, a notary public for the State of California, city and county of San Francisco.

SEPTEMBER 5, 1851.

A true copy.

WILLIAM A. GORDON,
Chief Clerk Quartermaster General's Office.

We, William Porter, John Fensley, and Richard C. Williams, shipmasters, residents at the time on board of their respective ships at Benicia, do hereby jointly and severally declare and attest unto all whom it may concern, that, on the 28th day of July, A. D. 1851, at

the instance of Isaac Swain, master of the ship *Ellen Brooks*, of Boston, then lying alongside of the United States government hulk at Benicia aforesaid, discharging cargo, that we went on board and alongside of the ship called the *Ellen Brooks*, of Boston, of the burden of four hundred and sixty-four tons or thereabouts, to examine the said ship; and having carefully and particularly inspected, examined, and surveyed the said ship called the *Ellen Brooks*, of Boston, and found, upon examination, that said ship was lying upon the rocks, her rudder partly unhung, and the upper rudder joint broken, and the round-house over the rudder capsized by the uplifting of the rudder. The water being very muddy could not ascertain what damage, if any, was done to said rudder below. We also found that said ship's star-board main channel was carried away, caused by government hulk, which fell over upon said ship *Ellen Brooks*. We accurately sounded the depth of water around said ship *Ellen Brooks*, and found but eight feet of water under her bows, and only nine feet under her stern, with twenty feet amidships. The rocks were in sight above the water at low tides, within twenty feet of the stem and stern of said ship, showing her to be in a very dangerous situation. The water had fallen away from her full six feet, and said ship had laid in the above position nineteen days, bearing upon the rocks at each extremity, with the centre of said ship afloat, and from six hundred to seven hundred tons of cargo on board, which must have strained her greatly and caused much damage to her copper, as well as her keel and forefoot; and in our judgment said ship ought not to proceed to sea, unless she is hove out, and her bottom, keel, rudder, and forefoot examined, and the damage repaired; do report that the ship *Ellen Brooks* is unfit to proceed to sea by reason of the damage caused as above stated, and that the bottom of said ship must be examined in order to save and effect insurance. For all which damages, in connexion with the estimates of the repairs furnished by Hudson & Plummer, of San Francisco, we are unanimously of the opinion that the sum of \$3,550 will be required to put said ship in a condition to proceed to sea.

Being also required to state our views in regard to the amount of damages that should be allowed the said ship *Ellen Brooks* per day for detention at Benicia, do hereby declare that the sum of \$75 per day should be allowed said ship for every day said ship was detained beyond the number of lay days expressed in charter, exclusive of all and every reclamation which the said Isaac Swain may be called upon by shippers of other cargoes for damages thereon, caused by the detention of said ship *Ellen Brooks* at the government depot near Benicia aforesaid, the same subject to adjustment at a future day; to which we are all ready to affirm upon oath when thereto required.

In witness whereof we have hereunto set our hands, at Benicia, this 28th day of July, A. D. 1851.

WILLIAM PORTER,
JOHN FENSLEY,
RICHARD WILLIAMS.

A true copy.

WM. A. GORDON,
Chief Clerk Quartermaster General's Office.

STATE OF CALIFORNIA, }
 County of Solano. } ss.

Personally appeared before me, the undersigned, a justice of the peace in and for the county of Solano, State of California, William Porter, John Fensley, and Richard C. Williams, who, being respectively sworn, do say upon oath that they respectively signed their names to the foregoing voluntarily, for the purposes therein stated.

Witness my hand this 5th day of August, A. D. 1851.

CALVIN GILLES,
Justice of the Peace.

BENICIA, CALIFORNIA, October 16, 1851.

At the request of Captain Isaac Swain, of the ship *Ellen Brooks*, I make the following statements regarding his bringing the above named ship to the government landing near Benicia barracks.

On the morning of the ninth day of July, 1851, I called at the office of the depot quartermaster at this place, and was informed by him that the ship *Ellen Brooks* had arrived at Benicia, and that the captain, Swain, was unwilling to come up to the government landing. The quartermaster requested me to call on Captain Swain, and tell him that his ship could not be discharged unless she was brought up to the government landing. I went to Benicia, saw Captain Swain, and on his verbal report that he was ready to discharge, told him to proceed to the quartermaster's landing. At office hours next morning I received a note, dated and written the day before, reporting compliance with my directions, and his readiness to fulfil the remainder of his charter-party. I acknowledged the receipt of his note, and at his request added a postscript, stating that his coming to the government wharf had been in pursuance of my directions, as in similar cases, or in words to that effect; all of which I certify to be correct.

GEO. PEARCE ANDREWS,
Brevet Major U. S. A., A. C. S.

A true copy.

WM. A. GORDON,
Chief Clerk Quartermaster General's Office.

UNITED STATES OF NORTH AMERICA, NORTHERN DISTRICT OF CALIFORNIA.

RAPHAEL ORREGO, et al., }
 vs. }
 THE SHIP ELLEN BROOKS. }

I hereby certify that the following named persons, libellants and intervenors in this suit, were awarded the amounts respectively placed

opposite to their names, by the commissioner to whom was referred to report thereon the amount due.

To Raphael Orrego	-	-	-	-	-	\$866 00
To James Duncan	-	-	-	-	-	1,400 70
To Wm. Joliffe	-	-	-	-	-	256 00
To Wm. T. Clark	-	-	-	-	-	3,538 16
						<u>6,060 86</u>

And that the following are the several amounts of the bills of costs, filed in this office, in the same case :

Marshal's fees	-	-	-	-	-	\$347 72
Clerk's fees	-	-	-	-	-	131 29
Commissioner's fees	-	-	-	-	-	99 00
Proctor's fees	-	-	-	-	-	65 62½
						<u>643 63½</u>

In witness whereof, I have hereunto set my hand and seal of office of the clerk of the United States district court for the northern district of California this 27th day of October, A. D. 1851, and of our independence the seventy-sixth.

[SEAL.]

JOHN A. MONROE, *Clerk.*

A true copy.

WM. A. GORDON,
Chief Clerk Quartermaster General's Office.

BENICIA, CALIFORNIA, *October 16, 1851.*

At the request of Isaac Swain, I take pleasure in stating that the cargo of flour landed from the ship Ellen Brooks under his command, in July last, was in better order and condition than any that I had received heretofore.

GEORGE PEARCE ANDREWS,
Bt. Major U. S. A., A. C. S.

A true copy.

WM. A. GORDON,
Chief Clerk Quartermaster General's Office.

To all whom this present shall come greeting :

Know ye that I, Daniel M. Fraser, mayor of the city of Benicia, in the State of California, do hereby certify that the hulk at the United States post or barracks, near this city, known as the government

landing, is situated beyond and out of the waters and jurisdiction of the city of Benicia aforesaid.

Given under my hand and seal of office at Benicia, this thirty-first day of May, A. D. 1852.

DANIEL M. FRASER,
Mayor.

[SEAL.]

A true copy.

WM. A. GORDON,
Chief Clerk Quartermaster General's Office.

We, Phineas Hudson, shipwright, and Addison Plummer, rigger, residents of San Francisco, California, do jointly and severally declare and attest unto all whom it may concern, that on the second day of August, 1851, at the instance of Isaac Swain, we went on board of the ship *Ellen Brooks*, of Boston, of the burden of 464 tons, or thereabouts, and examined the damages as far as we could discover, to wit:

To repair rudder and main channel	-	-	-	\$350 00
To take the said ship to the shears, sight the bottom, and replace her at her moorings	-	-	-	3,200 00
				<u>3,550 00</u>

And whatever damages the bottom of said ship has sustained in coming in contact with the rocks must be an additional expense.

All which we are ready to affirm upon oath, when thereto required.

In witness whereof, we have hereunto set our hands this fourth day of August, A. D. 1851.

PHINEAS HUDSON,
Shipwright.
ADDISON PLUMMER,
Rigger.

Witness: E. J. MOORE.

Sworn to before

E. J. MOORE,
Notary Public.

SAN FRANCISCO, *August 13, 1851.*

A copy of which is on file in the bureau at Washington.

WASHINGTON, *June 21, 1854.*

SIR: The undersigned begs leave to present the following views in regard to his claim now before you:

1st. The charter contract was fulfilled by me when my ship anchored at Benicia, and the government notified that I was ready to deliver cargo. It is for you to say whether that contract was broken, and the party liable for any damage for non-acceptance of cargo at Benicia.

2d. I transported the government stores from Benicia to the government barracks, by the orders of the United States commissary of

subsistence. It is for you to say if I am entitled to compensation for said transportation or not, and if entitled to compensation to state amount.

3d. That the Ellen Brooks proceeded, by orders of the government agent, beyond the limits of her charter contract, in order to land the army stores at a point most for his convenience, and thereby suffered damage. It is for you to say, from the evidence produced, what is the amount of said damage.

4th. The collector of the port of Benicia and the commissary of subsistence, government officers, quarrelled in regard to their respective duties for ten days. The commissary refused to pay duty on army stores, and the collector seized the ship in consequence thereof, and closed her hatches for ten consecutive days, which was the means of destroying a large amount of property. Now, in all cases when a collector of a port seizes a foreign vessel, and damages to ship or cargo thereby accrue, the government has invariably paid the damage. It is for you to say whether an American citizen stands on equal ground with the foreigner; and if he does, then it is for you to say whether the amount allowed by the United States district court, and the value of the ship, as she was sold by order of said court to meet said award, shall in this case be allowed?

Very respectfully, yours, &c.,

ISAAC SWAIN.

Hon. S. P. CHASE,

Senator from Ohio and Committee of Claims.

I have shown my claims to a great many senators and members of Congress, and all of them, without exception, acknowledge them just, and assured me that I might count on their vote and influence, whenever they came before the Senate and House. I will refer to one member of the House, the Hon. J. B. Macy, of Wisconsin, who has very particularly examined my claims; he says they ought to be allowed, that they are just claims upon the government. Mr. Macy, I presume, is allowed by all by whom he is known to be a man of more than ordinary abilities—a man well versed in all that pertains to civil and governmental matters, and more particularly in matters connected with government and marine transactions. The above remarks I hope will meet with your approbation and consideration.

I am, very respectfully, yours, &c.,

ISAAC SWAIN.

Hon. S. P. CHASE.

SAN FRANCISCO, *August 4, 1851.*

DEAR SIR: We, the undersigned, have examined the ship Ellen Brooks, and estimate the damage as far as we can discover at -	\$350
To sight her bottom and caulk her upper works, and replace her at her moorings - - - - -	3,200
	3,550

Whatever damage the bottom of said ship has sustained must be an additional charge.

PHINEAS HUDSON,
Shipwright.
ADDISON PLUMMER,
Rigger.

Capt. ISAAC SWAIN.

Sworn to before E. J. Moore, a notary public in California, city and county of San Francisco, August 23, 1851.

SAN FRANCISCO, *October 30, 1851.*

SIR: I herein transmit to you, by the Hon. James F. Simmons, a letter from Major Lee, United States commissary of subsistence at Benicia, California, together with authenticated vouchers for damages which accrued to the ship "Ellen Brooks" in discharging of army stores at Benicia, in July last past, for her detention at the government depot at Benicia, causing much damage to other cargo destined for San Francisco, and for the violation and non-fulfillment of charter on the part of the agents of the United States government. The above-named ship, as you will see, was placed by order of Major Andrews in a position where she was grinding upon the rocks for a space of twenty days, with a full cargo on board, and the water ebbing away from her full six feet at every fall of the tide, which produced the damage; and the unwarrantable detention of the ship by the agents of the government in not giving bonds for the payment of the duties, and obtaining a permit from the collector to discharge my government cargo, caused the said ship "Ellen Brooks" on her arrival at San Francisco to be libelled and attached by shippers of other cargo, and large amounts awarded to them by the United States district court, and said ship to be sold by the United States marshal to satisfy the judgments against her. All which has caused the subscriber, master and owner of said ship, to be forcibly dispossessed of his property, to incur heavy expense, great loss of time, and the total abandonment of his voyage to the East Indies, and from thence home.

I am, therefore, compelled by the circumstances thus accruing to seek from the United States government redress for the heavy losses which I have sustained, believing they will render a just and speedy reward, and beg leave to lay before you the following attested claims:

Firstly. Non-performance of charter	-	-	-	\$4,000 00
Secondly. Amount of necessary repairs to enable said ship "Ellen Brooks" to prosecute her voyage as per estimate of Plummer and Hudson	-	-	-	3,650 00
Thirdly. Three surveys and estimates	-	-	-	150 00
Three protests	-	-	-	15 00
Three attestations and travelling expenses	-	-	-	45 00
Fourthly. Amount of damages awarded by the United States district courts to the libellants of ship "Ellen Brooks"	-	-	-	6,060 86

Fifthly. Amount of the United district court and United States marshal's fees - - - - -	\$643 63
Sixthly. Cost of attorneys in defending ship "Ellen Brooks" in the United States district court - - -	225 00
Seventhly. Amount of loss to this claimant by having said ship "Ellen Brooks" attached and sold by order of the United States district court to satisfy the judgment against her, thereby causing the abandonment of her intended voyage, loss of time, and total derangement of his business - - - - -	10,000 00
	24,789 49

All of which is most respectfully submitted to the consideration of the United States government, hoping that it will meet the attention and approbation of those who exercise its functions, that they may deal liberally with me for the heavy losses which have fallen upon me from the above causes.

ISAAC SWAIN.

Hon. Major General JESUP,
Quartermaster General United States army.

A true copy.

WM. A. GORDON,
Chief Clerk Quartermaster General's Office.

SAN FRANCISCO, *May 11, 1852.*

I, George Sears, hereby certify that I was chief mate of the ship Ellen Brooks, Isaac Swain master, in her late voyage from Valparaiso to this port via Benicia, with government stores and other cargo on board, and that on the arrival of said ship at Benicia, all the cargo then on board was in good order, and that on our arrival, or the arrival of the ship at Benicia aforesaid, on the eight day of July, 1851. The revenue officer came on board and closed the hatches, and caused the same to be closed, preventing the air from penetrating into the ship, until the 28th of the same month, being a term of twenty consecutive days, excepting a few hours in the day time when discharging, which closing of the said ship caused the destruction of all the apples, peaches, and potatoes that were on board. I also testify that Captain Swain caused the ship Ellen Brooks to proceed to the government landing at the post above Benicia, on the first turning of the tide after receiving his orders to do so, as the ship could not proceed until the tide turned up river, and on the 9th of July, on the following day after we first anchored, at Benicia we proceeded to the government post and hauled alongside of the government hulk, or as near to her as the rocks would permit, and was ready to deliver our cargo on the morning of the 10th of said July. But we did not discharge any cargo until the 18th of said July, on account of the duties

not being paid or secured; and also, when we did begin to discharge, the government officers were very dilatory in receiving the cargo, taking from our tackles only two to three hundred half bags of flour per day, when we were prepared with sufficient men in the ship to discharge two thousand half sacks of flour per day, and after thus discharging, slowly for several days, on or about the 23d day of July, the custom-house officer on board received an order from Mr. Solliers, the collector at Benicia, to deliver no more government stores until further orders, and we ceased delivering until the next day, the officer informing me that the cause was that the duties had not been secured according to agreement by the government officers. I hereby further testify that the ship *Ellen Brooks* was hauled to the government depot by the orders of the government officers at the government station called the post, but against the protest of Captain Swain, who expressed himself to me that he would obey orders in order to avoid difficulty and expense, and make his demand on the government for damage, if any occurred; and I am fully convinced that Captain Swain used every exertion in his power to have his ship, the *Ellen Brooks*, discharged, and to prevent any delay at Benicia, and am further convinced that had the duties been paid by the government officers on the cargo on board of said ship *Ellen Brooks* belonging to government, and sufficient men to have received and taken away the goods as fast as we could have delivered them, together with a sufficient pier, with depth of water sufficient to float a ship, no detention nor damage would have occurred to said ship *Ellen Brooks*. But the position of said ship *Ellen Brooks*, whilst lying alongside of the government hulk at Benicia aforesaid, in July last past, was that of lying on the rocks at her head and stern for the space of twenty days, unhooking her rudder and causing much other damage. All which is hereunto subscribed and sworn to by me as the truthful facts as they occurred, to the best of my recollection, this twelfth day of May, A. D. eighteen hundred and fifty-two.

GEORGE SEARS.

Witness, E. J. MOORE.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

On this twentieth day of May, A. D. one thousand eight hundred and fifty two, before me, a public notary in and for said county, duly commissioned and sworn, came George Sears, mate of the ship *Ellen Brooks*, to me known, and the individual who signed the foregoing statement, who by me being duly sworn, deposed and said the matters therein related are true.

In testimony whereof I have hereunto set my hand and affixed
 [SEAL.] my seal of office the day and year above written.

E. J. MOORE,
Notary Public.

A true copy.

WM. A. GORDON,
Chief Clerk Quartermaster General's office.

UNITED STATES COURT OF CLAIMS.

DISTRICT OF COLUMBIA, }
 County of Washington. }

In the matter of Isaac Swain.

The specifications of account are as follows in the petition :

1st. Forfeiture of charter party.....	\$4,000 00
2d. Transporting 250 tons freight to the government post.....	1,250 00
3d. Damage sustained to ship in proceeding, by order of United States officers, beyond charter contract.....	3,550 00
4th. Damages to cargo, as per award of the United States district court.....	6,704 49
5th. Expenses in defending suit.....	225 00
6th. Cost of vessel, in October, 1850,.....	10,000 00
7th. Damages, in interest, loss of time, &c.....	12,000 00
Total.....	<u>37,729 49</u>

The first item is the amount of forfeiture provided for in the charter party, and is clearly in the nature of *liquidated* damages.—(See cases in Sedgwick on Damages, 397 to 412; 2 Alk., 190; Barton *vs.* Clover, 1 Holt's N. P. cases, 43; Pierce *vs.* Fuller, 8 Mass. R, 273; Crisdee *vs.* Bolton, 3 Car. & Payne, 240.) In the last case, the court say it is the office of the court to ascertain the *intent* of parties, and if not contrary to law, to carry their intent into execution. Again: "We can have no safer guide to go by in directing the amount of compensation for breach of contract in such cases than that estimate which the parties, each knowing all the circumstances of the case, and anxiously taking care of their respective interests, have agreed on."

The *official* correspondence, on file, shows the authority of the parties entering into charter party; and the same correspondence shows clearly how it was broken and disregarded by the government of the United States, acting through her officers.

The second item is a clear case of *quantum meruit*. The value of the labor done, and performed for the United States by the complainant, is fully established by several witnesses to be the amount charged, \$1,250. The freight was over 250 tons--271 tons, as proven by Daniel F. Wright, one of the seamen on board the "*Ellen Brooks*." The distance is proven to have been at least five miles from the ship's tackles to the government post, and Quartermaster Allen says it would have cost five dollars per ton to have lightered the stores to that point. Several witnesses testify to this same fact. Captain Swain transported the 271 tons to the government post, and asks only the usual charge as compensation. The chart herewith filed also proves the distance from the ship's tackles at the port of Benicia, as called for in the charter party, to the government hulk, five miles above, to which Captain S. was compelled to proceed with the public stores, in violation of his policy of insurance, &c., and over and beyond charter-party.—

(*Hughes vs. Denny*, 5 M. & W., 183; *Poucher vs. Norman*, 5 D. & E., 649; 3 Barn & C., 746; *Grafton vs. Armstage*, 15 Law J., 11.)

The other items of the account are all special and consequential damages, arising out of the action of the officers of the government in the discharge of their official duties, and are fully comprehended in the language of the Attorney General of the United States in his opinion on the San Francisco pilot cases, in which he says:

"8. Thus governments hold themselves responsible to individuals for injuries done to the latter by public officers in the collection of the revenue or administrative acts of governmental relation."—(Sedg. on Damages, 72 *et seq.*; Addison on Contracts, 1069.)

Every allegation in the petition will be found to be fully supported by the testimony on file.

The third item is proven by an experienced and skillful shipwright who made the examination or survey of the "Ellen Brooks," (Phineas Hudson.)

The fourth item is shown by the certificate of the clerk of the United States district court for the northern district of California.

The fifth item is proven by the attorney who defended the "Ellen Brooks" in the district court, and who received the amount for his said services.—(*Guild vs. Guild*, 2 Met., 229.)

Sixthly, the cost of the claimant's ship is established by the evidence of Mr. F. W. Macondray and B. B. Williams, who also show her superior workmanship, &c.

The seventh and last item of the claimant's charge is for "damage in interest, loss of time, &c., &c., \$12,000," and is fully supported by the evidence of Daniel F. Wright and B. B. Williams, the latter of whom estimates the damage for ten months at \$18,000.

Damages for loss of time, &c., see *Johnson vs. Arnold*, 2 Cush., 46. Loss of capital, *Nurse vs. Barnes*, T. Raym. R., 77.

The official correspondence, submitted to the court, shows the authority of the party binding the government in the charter party, and the official certificates of Major Andrews, General Wool, Major Cross, and Major Lee, not only show the violation of the charter party by the government agents, but its strict and literal fulfillment by the captain of the "Ellen Brooks." These officers prove the loss of a portion of the army stores, and how they were lost and destroyed by the improper detention of the ship and the closing of her hatches, and they fully recognize the liability of the government for damages. With them there was a contention as to which bureau should indemnify—the commissary or quartermaster's department. Attention is also particularly called to the closing paragraph of Major Lee's statement, as showing that the loss of the cargo, (500 packages,) which had been refused and thrown overboard at San Francisco, as testified to by Daniel F. Wright, was properly attributable to the improper detention of the vessel at the government hulk at Benicia and the closing of her hatches.

The claimant annexes hereto a copy of his original petition, and submits it as a part of his brief.

ALEXANDER H. EVANS,
Attorney for Swain.

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DISTRICT OF COLUMBIA, }
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The claimant annexes hereto a copy of his original petition, and submits it as a part of his brief.

ALEXANDER H. EVANS,
Attorney for Swain.

ISACC SWAIN vs. UNITED STATES.

The opinion of the court was delivered by SCARBURGH, J.

The petitioner, being the owner and master of the ship *Ellen Brooks*, on the 10th day of April, A. D. 1851, entered into a charter-party with the United States. It is as follows:

"It is this day mutually agreed between Isaac Swain, master of the good American ship called the *Ellen Brooks*, of ———, of the burthen of ——— tons per register, or thereabouts, now lying in the port of Valparaiso, of the one part, and Joshua Waddington, of Valparaiso, merchant, as agent for Major Lee, of the other part, that the said ship being tight, staunch, and strong, and her decks and sides properly caulked, and every way fit for the voyage, shall take in, upon the terms hereinafter mentioned, a quantity of cargo as per note at foot, and being so loaded, shall therewith proceed direct to Benicia, Upper California, and deliver the same from ship's tackles, at the expense of the ship charterers, agreeably to the bill of lading, and so end the voyage, (restraint of princes and rulers,) the danger of the seas and navigation, fire, pirates, and enemies during the said voyage, always excepted. For the discharging of the said cargo ten working days are to be allowed the said merchant, if the ship be not sooner discharged, and from the day she is ready to discharge or unload at Benicia until finally discharged, time occupied in sailing from port to port not counted as working days. The master is to give notice in writing when he is ready to deliver cargo. The freight to be paid, as under, four thousand dollars in full; the captain to sign bills of lading without reference to rate of freight, and without prejudice to this charter-party. The ship to find necessary dunnage and mats to keep the cargo clean. The owners to be liable for any damage arising from side-lights or ports. Penalty for non-performance of this charter-party, \$4,000.

"The cargo to comprise, more or less, the following:

- "4,000 quintals of flour,
- " 500 bushels of beans,
- " 500 bushels of potatoes,
- " 500 bushels of onions,
- " 500 pumpkins,
- "3,000 lbs. dried peaches.

"The master obliges himself to have the potatoes, onions, and pumpkins, overhauled and examined whenever the weather will permit, and at the same time have places apart for any that may have got bruised or damaged.

"The vessel to leave this port before the 30th April, A. D. 1851.

"VALPARAISO, April 10, 1851."

The goods were taken on board and the ship proceeded to Benicia, where she arrived on the 8th day of July, A. D. 1851, and the next day the petitioner reported her to the commissary of subsistence at that

port as ready for delivery. He was told by the quartermaster that it was incumbent on him to carry his vessel to the government hulk, or port landing. This he declined to do, because he did not consider that his vessel would be safe at that point; but as other vessels had landed there, the quartermaster refused to receive the goods, unless he would carry his ship to that point. The petitioner claimed that charter-party only required him to go to Benicia, and that he was not bound to go beyond the limits of that place, and that he had fulfilled his contract by having his ship anchored there. The quartermaster, without undertaking to decide what was the proper construction of the charter-party, still refused to receive the goods unless they were delivered at the landing of the port. This point is about one and a quarter mile beyond the limits of Benicia. The distance from the western harbor of Benicia to the government hulk is between four and a half and five miles. The western harbor is the usual place of anchorage for vessels bound to Benicia, and the expense of lighterage thence to the government hulk was, at that time, at least five dollars a ton.

On the same day (the 9th day of July) the petitioner carried his ship to the government hulk, and again gave notice to the commissary of subsistence there that he was ready to deliver the goods belonging to the United States. The collector of the port demanded duties upon these goods, and payment of them being refused by the proper officers of the army of the United States, the collector seized the ship, put her in charge of a custom-house officer, and closed and sealed her hatches. This difficulty was not settled until the 17th day of July, when the delivery of the goods was commenced, but the same was not completed till the 28th day of July.

On the night of the 9th day of July, whilst the ship was lying alongside of the government hulk, the tide receded, and left her, with all her cargo on board, on the rocks. She lay at this place until the goods belonging to the United States were delivered to the proper officers. Whilst she lay there she was very much injured. The full extent of the injury which the ship sustained could not be determined without heaving her out; but the expense of repairing the injury, which was visible without heaving her out, and of heaving out, was estimated at three thousand five hundred and fifty dollars. Any repairs which her bottom might have required would have been an additional expense.

The petitioner alleges that he had on board his ship other goods; that they were damaged by her detention at the government hulk; and that suit was brought by the freighters to whom they belonged, and a recovery had against him on that account of \$6,704 49. He has filed an imperfect copy of the record in that suit, and the solicitor has objected that it is inadmissible in evidence in this case, on the ground that it is not a full and complete copy.

The petitioner claims as follows:

For forfeiture of charter-party.....	\$4,000 00
For transporting 250 tons freight to government port.....	1,250 00
For damages sustained to ship in proceeding by order of the United States officers beyond charter contract.....	3,550 00
For damages to cargo as per award of United States district court.....	6,704 49

For expenses in defending suit.....	\$225 00
For cost of vessel in October, 1850.....	10,000 00
For damages in interest, loss of time, &c., &c.....	12,000 00

37,729 49

Considering the first item of the plaintiff's claim as a demand of the whole penalty inserted in the charter-party, upon the ground that it is to be regarded as damages fixed and ascertained by the contract of the parties, it is too obviously groundless to require much comment. It is sometimes a question of no inconsiderable nicety, whether an undertaking to pay a certain sum in the event of a breach of the contract is to be treated as a mere penalty, or as liquidated damages; but in this case, it is so clearly the former, that there can be no doubt on that point. Where the contract is for the performance of several things, and then one large sum is stated at the end to be paid upon breach of the contract, the doctrine is well settled, that it is to be regarded as a mere penalty.—(*Astley vs. Weldon*, 2 Bos. & Pull. R., 346, 353.) The most that the petitioner can claim in this case is, that in this respect the charter-party constitutes a reciprocal undertaking between him and the United States, in the penalty of four thousand dollars, for the faithful performance of the charter-party by them respectively. It was probably meant to be equivalent to the clause usually inserted in such instruments upon this subject. But assuming that such is its true character, still, in the case of a breach, the legal consequence is not that the penalty becomes liquidated damages recoverable against the party committing it. In England, if the charter-party is under seal, the party aggrieved has his election either to sue in debt for the penalty, or to bring his action for damages, upon breach of the contract; and the only difference between the two cases is, that in the latter the damages recovered *can*, whilst, in the former, they *cannot* exceed the penalty.—(*Harrison vs. Wright*, 13 East. R., 343.) The penalty in a charter-party, therefore, is not regarded as liquidated damages.—(*Abbott on Shipping*, 170.) Where the charter-party is not under seal, the penal clause is merely formal.

It is equally clear that the petitioner was not bound by the charter-party to carry the goods of the United States beyond Benicia. The words of the charter-party on this point are plain and unequivocal, and leave nothing for construction. If there was no place of delivery at Benicia, and it was the usage for ships destined to that port to deliver at the government hulk, then the question would assume a different aspect. Even if it had been the usage for the United States, under contracts for the delivery of goods at Benicia, to receive them at the government hulk, and that usage was known to the petitioner at the time of his entering into this charter party, then, too, the question before this court might be different from what it now is. But Benicia has a harbor and place of delivery of its own, and it is not pretended that a usage of any kind which recognizes a delivery at the government hulk as a sufficient compliance with a contract to deliver at Benicia exists. And, moreover, there is no evidence in this case from which it might be inferred that it was the intention of the parties that the

delivery under this charter party should be made at the government hulk. The failure of the United States, therefore, to receive their goods at Benicia was a breach of the charter party.

But what damages did the petitioner sustain by the breach of the charter party on the part of the United States, in failing to receive their goods at Benicia? Having carried the goods to Benicia, the petitioner was not bound to proceed further with them. He did, however, proceed further, but not under orders which he was bound to obey, but in compliance with directions which he was at full liberty to have disregarded. The circumstances under which this was done repel the presumption that it was a concession by the petitioner that he was bound by the charter-party to deliver the goods at the government hulk, or that it was a mere voluntary favor on his part. Still all the actual damages of which he complains were subsequently sustained, and none of them were either incidental to, or caused by, this breach. The voyage from Benicia to the government hulk was not a consequence of this breach. It can only be regarded as resulting from the mutual consent of the United States and the petitioner, and its effect was to render the petitioner's damages for this breach merely nominal, by avoiding all the consequences from which damages could have proceeded.

The direction given to the petitioner to proceed from Benicia to the government hulk and there deliver the government stores, and his consent to comply therewith, are, we think, to be regarded as a new contract entered into between him and the United States. By it the government hulk was substituted for Benicia as the place of delivery, and such other terms were inserted into the original contract as may justly and fairly be implied from the circumstances attending it. There can be no doubt that the old contract is to be resorted to for the number of days to be allowed for the delivery of the goods. The new contract did not deprive the United States of the benefit of the lay days for unloading stipulated for in the original contract, nor did it relieve the government from its obligation to effect the unloading within that time.—(*Jackson vs. Galloway*, 5 Bing. N. C., 71; *Galloway vs. Jackson*, 3 M. & Gr., 960.)—That part of the charter-party which relates to the discharge of the cargo still continued in force, and constituted a contract on the part of the United States that they would not detain the ship for that purpose beyond the designated period. The interference of the collector, which prevented the due performance of this part of the contract, whether legal or illegal, does not excuse the breach.—(*Bessie vs. Evans*, 4 Camp. R., 131.) But the petitioner does not claim any damages by way of demurrage. These, we infer, have been paid him.

It becomes necessary now to inquire what new terms were imported into the original by the new contract. These must be such as it may be fair to presume would, under the circumstances, have been expressly agreed upon, if an express contract had been made. The law, in raising a contract by implication, proceeds upon the assumption that each party was influenced by a desire to act with entire fairness, without the slightest advantage on either side. Whatever justice, considered with reference to a pure and elevated morality, demands,

that the law presumes was the contract between the parties. This is the rule in reference to such a contract between individuals, and we think that it applies with peculiar emphasis to a contract between the United States and a private person. Under this rule, it seems to us that the United States must be considered as having agreed (1) to pay the petitioner at least the usual freight from Benicia to the hulk; and (2) to compensate him for any injury which his ship might actually sustain by being laid alongside of the hulk, and remaining there till the cargo was delivered.

(1.) That the petitioner is entitled to a fair freight on the government stores from Benicia to the hulk is a proposition too plain to require an argument to sustain it. When the ship arrived at Benicia, her voyage under the charter-party was completed. In going from Benicia to the hulk, she performed a new voyage and additional freight was earned. The evidence shows, that the freight from Benicia to the hulk at that time was at the rate of \$5 a ton, and that the government stores amounted to 270 tons. The petitioner claims freight on only 250 tons, at \$5 a ton, \$1,200. We think that this claim is well founded.

(2.) In considering the second point of the implied contract, it must be borne in mind that the ship was to be carried to a place where, upon the recess of the tide, she would be left on the rocks. This was known to both parties. It must have been equally well known to both of them that no prudence or skill could have protected the ship in such a situation from injury. How far it would extend would depend very much upon the wind and the waves, and other circumstances; but that some injury would result was altogether inevitable. The dangers at this point were not merely those of ordinary navigation, which might be guarded against by prudential and skilful management, and would, therefore, be provided for in the estimation of the freight, but they necessarily exposed the ship to unavoidable injury. It cannot be presumed that a prudent ship owner would voluntarily contract to put his ship in such a situation for anything short of an actual indemnity for any injury which she might sustain. Even such a contract would be to his disadvantage. Why the officer intrusted with this business on the part of the United States should have deemed it expedient to act thus, we are not called upon to inquire. The fact is, that he did so act. He not only required the petitioner to carry his vessel to the dangerous point, but actually refused to receive the goods elsewhere, and this he did, as is shown by the evidence, without the slightest regard to the requirements of the charter-party. It is with the fact that we have to deal, and in view of it to consider what obligations it imposed on the United States. They required him to carry his vessel to the hulk, and an implication of anything less than a promise on their part to compensate him for any injury which she might actually sustain would not do him justice. If this were a case where injury might or might not have resulted, then a fair compensation for the risk incurred would be just; but inasmuch as here injury to some extent was inevitable, the least that can be required is, compensation for the injury actually sustained. The petitioner claims for injuries actually sustained by his ship at the hulk \$3,550. Phineas Hudson testifies: "On examination of the ship, I found the

upper rudder joint broken, the starboard main channel carried away, the main rail and ———, splintered, and reported to Captain Swain that it was necessary to heave his ship out to ascertain the full damage done. But to repair the damage then in sight and to heave her out and sight both sides would cost three thousand five hundred and fifty dollars; and further, that all repairs which her bottom might require from being in contact with the rocks would be an additional expense, the amount of which I could not tell till I had seen it." We are of the opinion that the petitioner's claim in this respect is sustained both by the law and the evidence.

The claim for "damages to cargo as per award of the United States district court, \$6,704 49," and "for expenses in defending suit, \$225," is not sustained by the evidence. The paper filed by the petitioner is a mere abstract, and not a complete copy of the record of the case, in which the damages and costs claimed were awarded, and is, therefore, inadmissible as evidence in this case.

The claim "for cost of vessel in October, 1850, \$10,000," is not allowed. The petitioner did not lose his ship.

The claim "for damages in interest, loss of time, &c., &c., \$12,000," is also rejected.

We shall report to Congress a bill in favor of the petitioner for four thousand eight hundred dollars.

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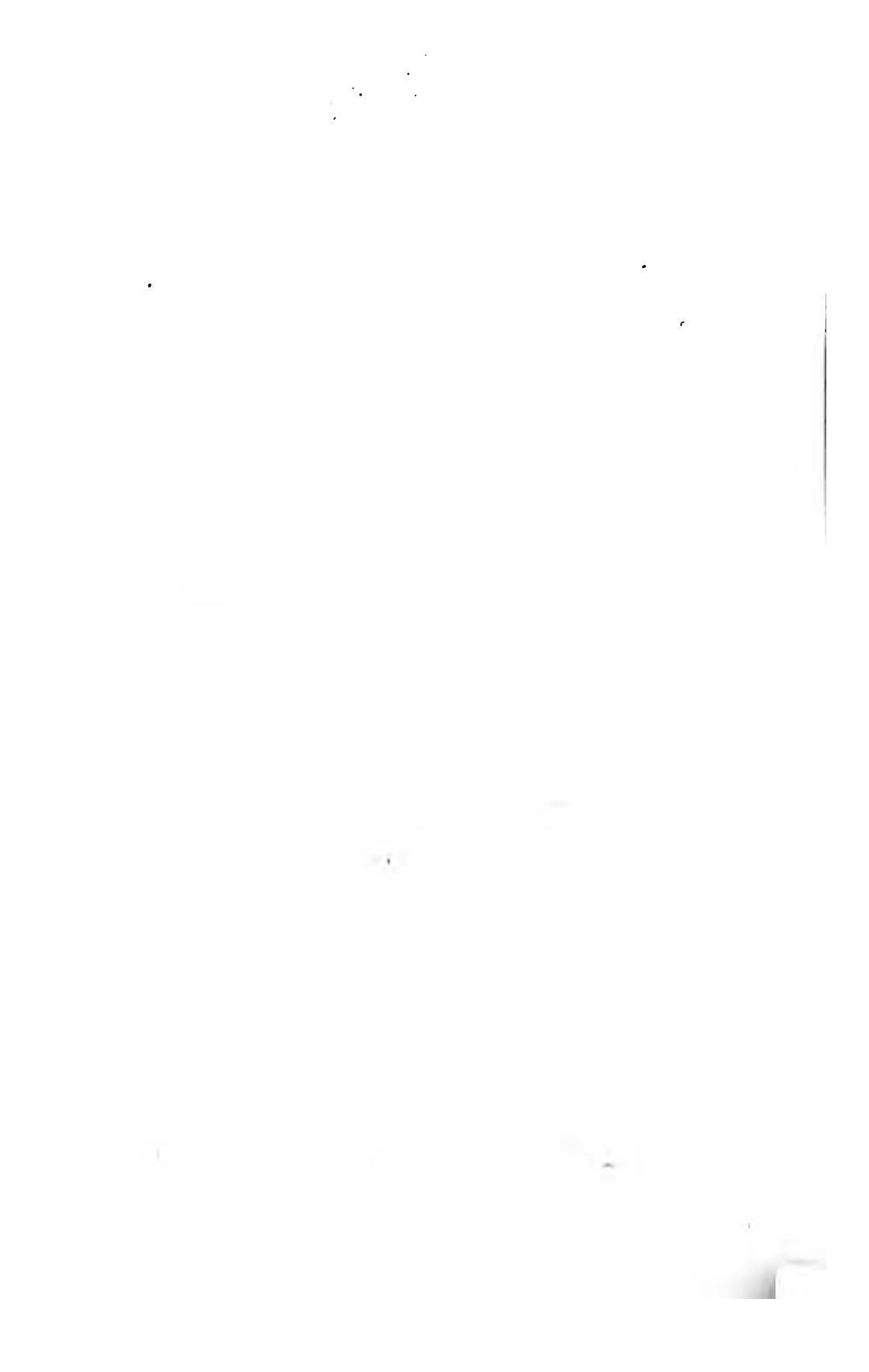
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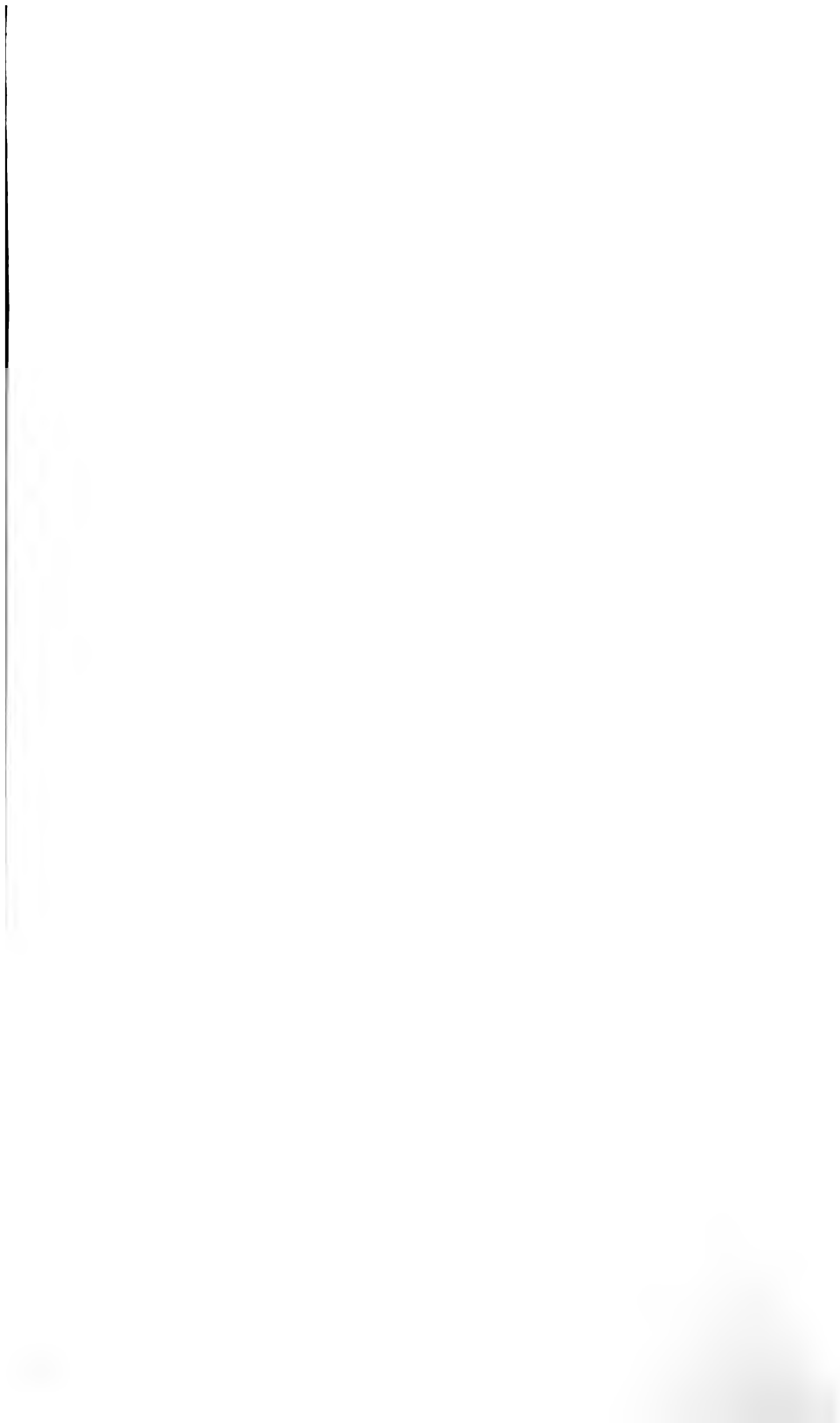
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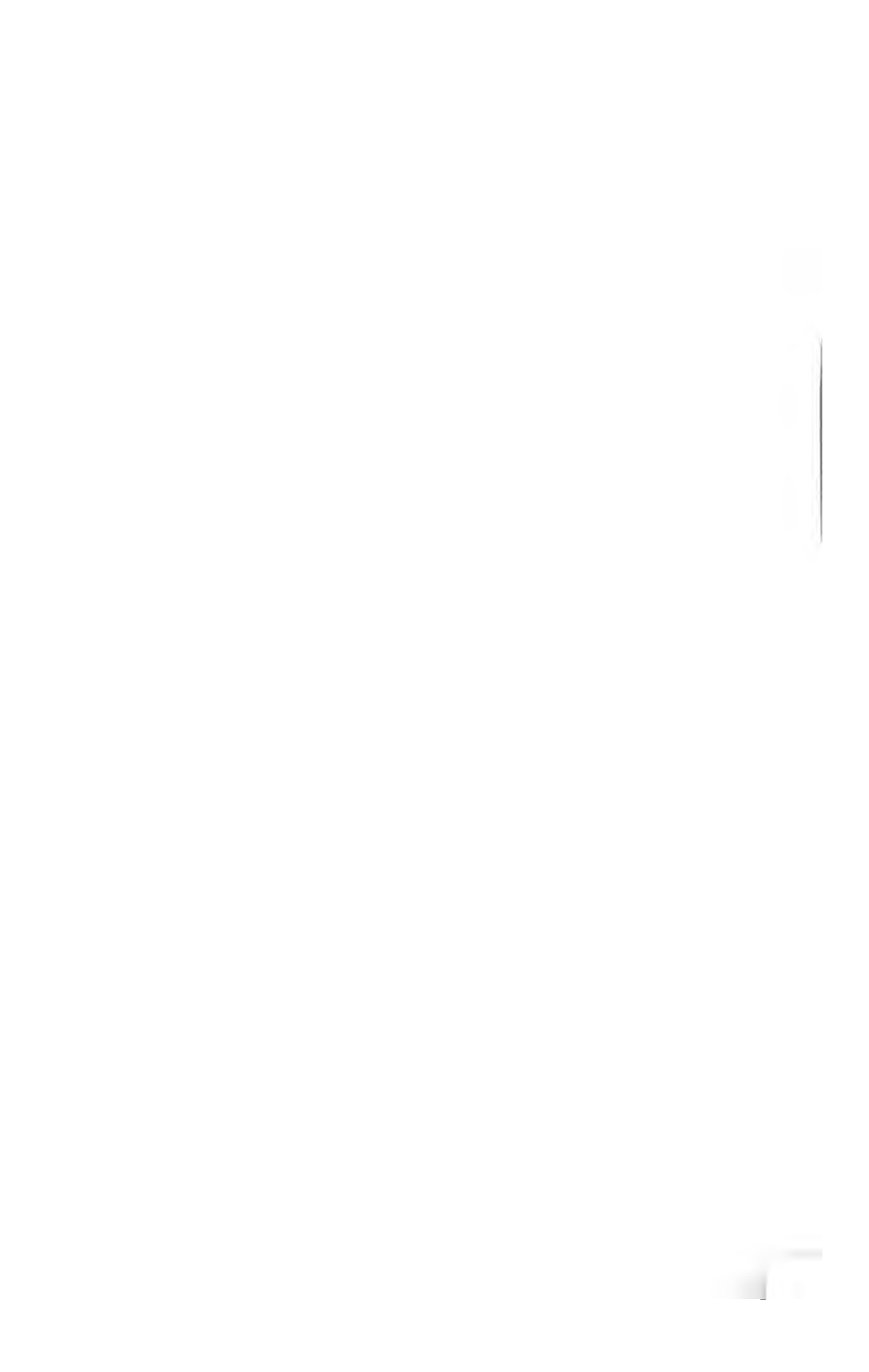
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